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In The

Supreme Court of the United States

October Term 1976

No. 76-1577

JAMES WENDELL HALL,

Petitioner,

vs.

STATE OF IOWA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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JAMES WENDELL HALL,
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v.

STATE OF IOWA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the Order of the Supreme Court of Iowa entered in the above entitled case on February 10, 1977.

CITATIONS TO OPINIONS BELOW

The unreported decision of the District

Court of Johnson County denying the defendant's Motion for New Trial and Arrest of Judgment is dated July 2, 1974 and is presented in Appendix A hereto, infra, p. 1a. The Judgment below was affirmed in part by the Iowa Supreme Court on November 12, 1975 and the matter was remanded to the District Court with instructions granting the defendant the right to in camera inspection of a previously withheld section of the Grand Jury minutes to determine whether such inspection disclosed exculpatory evidence. This judgment is reported in 235 NW 2d 702 (Iowa 1975) and is presented in Appendix A hereto, infra pg. 38a. The District Court, in an unreported decision dated February 27, 1976, found that there was

no exculpatory evidence, which decision is presented in Appendix A hereto, infra pg. 159a. On March 12, 1976 a petition for rehearing was filed with the Iowa Supreme Court which was denied by the Iowa Supreme Court on April 12, 1976, and is presented in Appendix A hereto infra pg. 174a. The Iowa Supreme Court on January 19, 1977 affirmed the decision of the District Court on remand, which Judgment is reported in 249 NW 2d 843 (Iowa 1975) and is presented in Appendix A hereto, infra pg. 175a. On February 1, 1977 another petition for rehearing was filed with the Iowa Supreme Court which was denied by the Iowa Supreme Court on February 10, 1977 and is presented in Appendix A hereto, infra pg. 202a.

JURISDICTION

The final judgment of the Iowa Supreme Court was rendered on January 19, 1977. A timely petition for rehearing was filed on February 1, 1977 and was denied on February 10, 1977. The jurisdiction of this Court is involved under 28 U.S.C. Section 1257 (3) for the reason that the state Court denied to defendant the right to equal protection and due process under the Fourteenth Amendment and the right to a fair and impartial trial under the Sixth Amendment and his right to remain silent under the Fifth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

I

PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY - WHETHER THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT OF EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND THE RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A prejudicial atmosphere manifested itself at the outset of these proceedings before the Grand Jury. The state repeatedly injected racially prejudicial matters by the manner in which the witnesses were questioned, by presenting a considerable mass of evidence which had no proper place

in the Grand Jury investigation, and by comments to the Grand Jury as well. For an example, in addressing the panel the Prosecutor stated: "Also, he is known to beat up Leslie Hall, a White girl friend. Incidentally, this Jim Hall won't go with a Black girl. He will only go with White girls, which is interesting; maybe something's wrong with him. Maybe he hates them down deep, you see, but he has beat up this Leslie Hall" (See excerpts of Grand Jury minutes Appendix B at pg. 203a) The alleged assault on Leslie Hall, whether true or untrue, is completely irrelevant, and can only be intended to enrage the Grand Jury. Even more inflammatory and improper are the remarks as to only going with

"White" girls and the amateur psychological guess as to some deep down hatred. (See remaining pages of Appendix B further illustrations of impropriety.) The Iowa Supreme Court in affirming the District Court noted in its opinion that the Prosecutor, on numerous occasions, had "exceeded the bounds of propriety" and although the Court refused to set aside the indictment, the Court was concerned to the extent that the Court expressed unqualified disapproval. (See Appendix A pg. 55a).

II

REFUSAL TO ORDER PRODUCTION OF EVIDENCE - THE TRIAL COURT ERRED IN ITS REFUSAL TO AFFORD THE DEFENDANT THE OPPORTUNITY TO

EXAMINE A FINGERPRINT WHICH WAS FOUND ON A MATCH BOOK COVER IN THE ROOM WHERE THE DECEDENT'S BODY WAS DISCOVERED.

The defendant was convicted entirely on flimsy circumstantial evidence which at best was minimal. The single most damaging bit of evidence was a thumb print of the defendant which was taken from a wash bowl faucet in the room where the decedent's body was discovered. However, another fingerprint from the room existed which was found on a match book cover. Prior to trial the Trial Court ordered the State to furnish a "description of all

items of real evidence pertaining to the commission of the alleged offense and of any real evidence in the possession of the State, whether or not it was to be used in the event of trial, together with an opportunity for him to examine same" (emphasis added) (See Appendix A, at pg. 64a) Despite the Order and a subsequent ruling during trial, the defendant was not afforded the opportunity to examine the fingerprint. The ruling of the Iowa Supreme Court at p. 714 of 235 NW 2d that there was no prejudice shown does not consider that defendant will never know if there was prejudice until the fingerprint is examined. Further, the State represented at trial that the fingerprint could not

be used to assist the defendant which was contrary to testimony at the trial by a state's witness.

III

DEFENDANT'S MOTION FOR DIRECTED VERDICT - THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CONCLUSION OF THE STATE'S CASE.

The State failed to place the defendant within the building during the time period that the murder allegedly took place, which by the opinion testimony at trial of the State'e expert places the outside limits of death between 3:00 p.m. and 9:00 p.m. (See Appendix A at pg. 103a). The Bill of Particulars stated the time of

death between 2:00 p.m. and 8:00 p.m. Two witnesses placed the defendant within the building on the day of the murder. The first, Rosemary Jones, stated before the Grand Jury and later at the trial as a defense witness that the person she saw was not the defendant. The next day further cross-examination, Rosemary Jones testified under a grant of immunity that it was the defendant and that she had lied on direct examination. (Note: Rosemary Jones had not testified prior to the motion for directed verdict). The Iowa Supreme Court indirectly conceded that the testimony of Rosemary Jones was entitled to no credibility and points to the testimony of the second witness (See Appendix A at pg 79a.)

However, Mr. Roberson placed the defendant within the building at approximately 10:30 p.m., which admittedly is beyond the estimated limits of the time of death.

Beyond these two witnesses, one of whom has told at least two different stories and the other of whom places the defendant in the building long after the time of death as fixed by the State, there is no other circumstantial evidence other than a hair found on the decedent's blouse which was consistent with the defendant's hair and a hair on the defendant's sneaker which was consistent with the decedent's hair (there is no need to belabor the little weight to be given proof of mere consistency)

and a fingerprint found on the faucet in the decedent's room for which there was no showing as to when, nor the circumstances under which, it was impressed there.

IV

SUPPRESSION OF EVIDENCE - THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE TESTIMONY OF ROSEMARY JONES AND JOHN REDING.

The testimony of Rosemary Jones, who recanted her testimony the following day, is characterized by the Iowa Supreme Court as "one of the strangest developments in this case" (see Appendix A at pg. 114a).

John Reding, an elevator repairman, was called by the State to rebut testimony

of Robert Dean Jones, Jones having testified that he had been in the elevator with the decedent and an unidentified white man shortly after 3:00 p.m. on the day in question. John Reding testified that at approximately 2:00 p.m. he had been in the elevator with an unidentified girl and her unidentified male companion, giving rise to the inference that John Reding was the unidentified white man whom Robert Dean Jones had seen. Although the Iowa Supreme Court in affirming the Trial Court found nothing of any importance in the testimony and commented that the witnesses were describing different events, the Court ruled that the testimony was not proper rebuttal evidence. (See Appendix A at pg. 113a)

It is submitted that although the Trial Court has broad discretion in these matters, the defendant was clearly prejudiced and the testimony of both should have been rejected.

V

PROSECUTORIAL MISCONDUCT - THE TRIAL COURT SHOULD HAVE GRANTED A NEW TRIAL ON THE GROUNDS THAT THE STATE IMPROPERLY COMMENTED IN CLOSING ARGUMENT ON THE FAILURE OF THE DEFENDANT TO TESTIFY IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Iowa Supreme Court acknowledges that the remarks of the State presented

a serious question (See Appendix A, pg.137a) and that comment upon the failure of the defendant to take the stand, if indefensibly made, would be grounds for reversal. The Court in finding no reversible error relied on the doctrine of invited error, i.e., the defendant in closing argument commented that the evidence did not require the defendant to answer to any matters raised and thereby opened the door to the State's right to answer that argument. It is submitted that the defendant's closing comment set forth in Appendix A at pg. 139a, was fair comment and did not give rise to the State's attack upon the defendant for electing not to testify. This is contrary to defendant's right to remain absolutely

silent without suffering any penalty or adverse inference.

VI

JURY MISCONDUCT - THE COURT ERRED IN NOT GRANTING A NEW TRIAL ON THE GROUNDS OF NUMEROUS INCIDENTS OF JURY MISCONDUCT.

1. On the first day of the trial it was brought to the attention of Court that a prospective juror who had not been selected had recounted to her personal attorney a conversation she had with selected juror, Cecil E. Goodlove wherein he stated "Let's just hang him and get it over with. I don't want to be on this damn jury" (See appendix B, at pg 212 a). On voir dire in Chambers the Court asked him whether he had made such a

statement and he answered "No I don't recall" and later stated "I don't even recall making it." When pressed further by the Court he responsed. "I could have but I just don't remember it..." At the conclusion he was asked whether it was conceivable that he could have made the statement and the only semblance to a denial was his answer "No, I wouldn't say that. I just would not have said that. I don't believe in that kind of business." Furthe the prospective juror stated that she had told her attorney "to be honest with you I don't think I would want to be judged by some of the people on that jury" (See Appendix C at pg. 220a) Notwithstanding a timely motion to dismiss Juror Goodlove,

this juror was permitted to sit through the entire trial and deliberations.

2. On the seventh day of trial, May 20, 1974, Juror, James Housel contacted the Court through the Bailiff and indicated that he would not be fair to the defendant if he continued on the trial (See Appendix C at pg 249a). The Trial Court declined to conduct a voir dire of Juror Housel and finally three (3) days later a local attorney telephoned the Court and stated that Juror Housel had made a remark that he was a juror and that he shouldn't be on this case. The attorney conveyed the message to the Court that Juror Housel had information prior to the trial of the tendancies of the defendant for violence

towards women. It was only at this time, the last day of trial, that the Court excused Juror Housel. Juror Housel had sat on the Jury and mingled with the jury for three (3) days after advising the Court that he should not be on the Jury. When asked whether he had expressed to any of the jurors the fact that he had independent knowledge as to matters within this case and wondered why it hadn't been brought out in evidence yet, Juror Housel replied "They know, you know, that I had other matters that were influenced, in my opinion, but I never told pro or con" (See Appendix C at pg.265a). Juror Housel went on to acknowledge that he had told the other jurors that he had

matters within his knowledge which were influencing him and that the other jurors knew it from "the day go" because he told them he did not know whether he could separate it at the time.

Certainly, Juror Housel was not promptly excused and there is little doubt that the defendant was thereby prejudiced. Beyond this is the presumption that the entire jury was contaminated by the continued presence of Juror Housel, and Juror Goodlove as well. Consider also that it was counsel not involved in the case in both instances that focused the Court's attention on the abuses.

3. Eight (8) of the jurors had a cocktail and apparently the Bailiff had

a beer at dinner before rendering their verdict. The jury began deliberations at 3:00 p.m., recessed for dinner from 5:30 p.m. to 7:30 p.m. and entered a verdict at 9:30 p.m. all in the same day. Once again the Iowa Supreme Court expresses disapproval but ruled that there was no showing of prejudice. However, two (2) hours after returning from dinner the jury reached a verdict. How could the Trial Court weigh the influence one cocktail has on each juror merely by observing demeanor? Must a juror stagger or slur his speech before imbibing has an influence on his judgment? Can the criminal system afford the stigma of such conduct by jurors shortly before rendering a verdict in a homocide case.

4. Lastly, another unselected juror, Cheryl K. Hinman, came forward more than a year after the trial to indicate that the foreman of the jury (Angerer) had made racially prejudiced references in regard to the conviction of the defendant (See Miscellaneous citation pg. 270a). These remarks were made one year following the trial but clearly indicate the tone of the trial.

For the record, the Goodlove and Hinman incidents were not specifically considered by the State Courts but jury misconduct has consistently been argued and this Court should consider the four irregularities in determining whether the Jury was tainted.

VII

THERE WAS SUFFICIENT CUMULATIVE ERROR COMMITTED TO WARRANT A NEW TRIAL.

The defendant urges the Court that all issues previously urged in themselves are sufficient to warrant a new trial. However, defendant also urges the Court that the issues cumulatively mandate a reversal in this case.

STATEMENT

The defendant, a black student and athlete at the University of Iowa was found guilty by an all white Jury on May 23, 1974 of the second degree murder of a white female student at the University, both of whom were 19 years old at the time. The murder took place on March 13, 1973 and the indictment was returned on September 19, 1973, more than six (6) months later. The defendant is presently free on bail of $100,000.000. Bail was continued under an Order of the Iowa Supreme Court dated March 28, 1977 pending application to this Court (See Miscellaneous citations at pg. 274a).

The indictment and conviction was based on flimsy circumstantial evidence and the proceedings were fraught with reversible

errors as previously outlined in Questions Presented. All of the questions presented herein were presented, argued and decided before the Iowa Supreme Court so as to give this Sourt jurisdiction to review the judgment on writ of certiorari (See State v. Hall, 235 NW 2d 702 in Appendix A, at pg. 38a)

Courts have long recognized the fact that a trial by a jury, any member or members of which are biased or prejudiced, is not a constitutional jury. Once the prejudicial conduct of the jurors is brought to the attention of the Court, it must recognize the presumption of partiality. Irwin v. Dowd 366 U.S. 717 (1960).

As for the State's actions before the Grand Jury, no attempt should be made to influence the action of the Grand Jury or to give effect to evidence adduced. State v. Hansen 215 NW2d 249 (Iowa).

Further, the cumulative effect of errors was recognized in Hermansky v. United States C.C.A. (Neb) 7F (2) 458 wherein the Court stated that while each error may not in itself affect the substantive right of the defendant, yet when the errors are considered together it can lead to the conclusion that the defendant did not receive a fair and impartial trial. Se also State v. Carey 165 NW2d 27 (Iowa).

In order to be effective, counsel must

be allowed to prepare for trial to the best of their ability and to do so they must have access to facts and information, which are necessary for a proper defense. State v. Aossey 201 NW2d 731 (Iowa). The defendant was denied inspection of the fingerprint on the match cover and said denial constituted reversible error.

To support a conviction on circumstantial evidence it must be so convincing as to exclude a reasonable doubt that the defendant was guilty of the offense. The proof must generate something more than suspicion, speculation or conjecture. State v. Blyth 226 NW2d 250 (Iowa 1975). Accordingly, the Trial Court erred in not granting the defendant's motion for

directed verdict at the conclusion of the State's case.

The defendant had the right under the Fifth Amendment to elect not to testify. The State is restrained from commenting on the defendant's failure to testify. It is submitted that this fundamental constitutional right was violated and a new trial should be ordered.

REASONS FOR GRANTING THE WRIT

Counsel is not unmindful of general proposition that it is not the function of this Court to correct ordinary error in the State Court proceedings. It is submitted that in this case the errors were of such number and magnitude as to clearly violate the defendant's fifth, sixth, and fourteenth

amendment rights to a fair trial by an impartial jury, at which he cannot be compelled to testify, and his underlying right to due process at the hands of the State Court. At least three jurors were tainted.

At 9:10 on the first day of trial the Court was informed of a statement made by juror Goodlove "Let's just hang him and get it over with. I don't want to be on this damn jury". When examined by the Court the juror does not deny making the statement but merely states he cannot recall if he made it or not. Juror Goodlove sat through the entire trial and deliberations.

On the seventh day of trial, juror Housel sought to be excused on the grounds

that he could not be fair to the defendant by reason of his prior independent knowledge of the case. The Court permitted him to sit until the final day of trial before ultimately excusing him. It is submitted that his continuing close contact with the other jurors, along with Juror Goodlove, could only serve to taint the jury.

While not before the Court below, Jury Foreman, Angerer showed his underlying prejudice in a casual statement made some time after trial. Obviously, his racial prejudice was not then new and was clearly carried by him in the deliberations.

On top of these matters affecting the jury we have presented the question of

the jury partaking of alcoholic beverages at a dinner break in the deliberations. While mere use of intoxicating liquors by members of the jury during a lenghty trial does not show an unfair trial, Baker v. Hudspath (1942 CA 10 Kan) 129 F2d 779, cert. den. 317 US 681 in this case the imbibing took place after the case was given to the jury for deliberation and is distinguishable. The Iowa Court recognizes these improprieties but failed to give due weight to their cumulative effect.

The sentence here is severe, fifty (50) years in prison. Surely before such a penalty is imposed the defendant is entitled to a fair and impartial trial as guaranteed by the sixth amendment. If this

defendant is denied a hearing by this Court in the circumstances recited, who among us can safely assume that he will be given a fair trial by an impartial jury when accused of a crime. The right to a fair trial by an untainted jury affects every citizen ever charged with a crime.

Added to the lack of a fair and impartial jury, the Court must consider prosecutorial errors and lack of impartiality on the part of the prosecutor. In presenting the case to the Grand Jury, the prosecutor remarks as to race and a prior unrelated alleged assault upon another white girl were calculated to inflame the Grand Jury. In his closing argument he was guilty of further misconduct in violating defendant's fifth amendment right to

remain silent by unfairly commenting thereon.

In each instance the Iowa Court was critical of the actions complained of, but failed to take account of the cumulative effect of these errors in denying the defendant a fair trial by an impartial jury.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

_____
ROBERT H. SIMANDL,
Counsel for Petitioner.

Dated: May 10, 1977

IN THE DISTRICT COURT OF IOWA IN AND FOR JOHNSON COUNTY

	)Dated: July 2,1974
STATE OF IOWA	) No. 6115
	)
vs.	)RULING ON MOTION
	)FOR NEW TRIAL
JAMES WENDELL HALL,	)AND MOTION IN
Defendant	)ARREST OF JUDG-
	)MENT

Defendant filed a motion in arrest of judgment on the 13th day of June, 1974, and on the same date filed a motion for a new trial containing 43 grounds. Subsequently he has filed additional motions containing paragraphs 44 through 46. The State has resisted the same. Both parties have offered evidence by way of exhibits supporting their respective positions. The Court at this time rules that State's Exhibit No. M-1 is received into evidence, and State's Exhibit M-2 is not received.

In considering the defendant's motion for new trial, the Court will break it down into topical headings with the corresponding paragraph numbers.

PRETRIAL

Paragraphs 1, 2, 3 and 5.

Various complaints were made concerning the grand jury proceedings. Complaints as to grand jury proceedings should have been handled before the plea was entered, and are too late when first made on a motion in arrest of judgment or on a motion for new trial. See 776.1 ICA, and State vs. Bading, 236 Iowa 468, 17 NW 2d 804.

Specifically as to paragraph 1, this is the first time the objection has been raised. No showing or prejudice has

been made where objection is not raised at trial leve. The Court has previously held that the exhibit is admissible, as the statute is not mandatory, but directory. State vs. Bozoukas 286 N.W. 458.

In regard to paragraph 2, names of witnesses whose testimony is felt to be immaterial by the grand jury need not be endorsed on the Indictment. State vs. Stump 254 Iowa 1181, 119 NW 2d 210, 220.

It is the conclusion of the Court that the matters raised in these paragraphs should have been raised before the matter went before a trial jury, and the trial jury verdict has affirmed the action of the grand jury, proper or not.

MOTION TO SET ASIDE INDICTMENT

Paragraphs 4 and 8

Defendant had previously filed motions to set aside the Indictment, and there had been previous rulings by other judges prior to trial time. This Court believes that these rulings were correct. Indictments cannot be quashed for insufficiency of evidence, and they are not grounds under 776.1 of the Code. State vs. Lamb, 239 Iowa 176, 30 NW 2d 734. Also see State vs. Salter, 162 NW 2d 427.

DISCOVERY

Paragraphs 6, 7, 9, 11, 12, 42 and 46

Complaint is made by the defendant in regard to failing to obtain certain items on his motion for bill of particulars, and

for his failure to get the transcript of the grand jury testimony prior to trial, before cross examination, and after trial.

In regard to the motion for bill of particulars ruled on October 12, 1973, by the Honorable Harold D. Vietor, see conclusions of law filed in said ruling and the cases cited.

In regard to the transcript of the grand jury testimony, this was refused by previous order of Court on several occasions, and in particular see the ruling of March 14, 1974, by the Honorable Ansel Chapman, setting out the reasons for the refusal. Although this Court did not allow the defendant to obtain the entire transcript of the grand jury testi-

mony, it did allow him to have the transcripts of those witnesses called by the State before cross examination. The Court did delete a few pages from said transcripts that contained hearsay, conversation of grand jurors and the prosecutor, and other immaterial matters that were not exculpatory in nature toward the defendant. By pretrial order and as a practice during said trial, it was not called to the attention of the jury that the defendant was put in a position that he had to object to or delay the trial by the obtaining of said transcripts. Many of the transcripts were given in advance to the defendant before the examination of the party called as a witness, others were

given at recesses, or the defendant agreed that he would recall the witness for further cross examination in the event he found matters in the grand jury transcript that he wished to cross examine on. The Court believes the jury had no intimation or information that would lead them to feel that the defendant was causing any delay or that the defendant was being over-technical. This was due in part to the cooperation of both the State's attorney and the defendant's counsel, and these problems were avoided.

This Court believes that there is a difference between the transcript of the grand jury and the minutes of evidence, and that the defendant is not entitled

to the transcript of the grand jury proceedings as a matter of right. He received the transcripts before cross examination, and had the full right of use of the same of the witnesses that appeared. For the reasons set out in Judge Chapman's ruling the Court does not believe that the defendant is entitled to all of the transcripts of testimony. Defendant claims that he has not been given a fair trial, that the Court has erred in many respects, and has already announced he plans on appealing the Court's decisions to the Supreme Court if this motion is ruled upon adversely to him. For this reason the Court does not believe that defendant is now entitled to the grand

jury transcripts. If defendant is correct in his assertion that the Court is in error, and that he is entitled to a new trial, he would then have the entire transcript in advance of trial.

Defendant further contends in paragraph 46 that the case of State vs. Peterson, decided by the Supreme Court las week, has opened up the criminal discovery procedure in the State of Iowa. This decision is based on one singular statute that allows a defendant to examine witnesses in the same manner as in civil actions. The Supreme Court in that case merely stated that the statute meant what it said, and has no reference to grand jury transcripts. The defendant did not ask for oral discovery.

The Court feels that it would be beneficial to all parties to have more detailed rules of criminal procedure, especially in regard to discovery. However, the rulings that have been made in this case by various judges, have allowed the defendant to have a multitude of items from the State's files and from the grand jury testimony itself, either before or during trial. Defendant's able counsel in argument admitted that they had spent approximately one thousand hours on this case, and did not come into this case unprepared or at a distinct disadvantage.

EVIDENTIARY MATTERS

Paragraphs 10, 13, 14, 15, 16, 17, 18, 19, 23, 24, 26, 27 and 32

In paragraphs 13 and 14 the defendant objects to the handling of photographic evidence and the admission of the same. The Court believes that the defendant is incorrect that he had to go through a lengthy process of examination and objection, which could only have been prejudicial to the defendant in the eyes of the jury. There were not photographs exhibited to the jury that were not admitted in evidence. Defendant was not required to make lengthy objections in front of the jury, and most, if not all, of the objections were ruled upon out of the presence of the jury. The Court excluded some cumulative photographs, and those that might have been inflammatory to the jury

and did not depict facts that could not be testified to . Although some of the photographs admitted may have been gruesome, they had probative value and in the opinion of the Court were helpful in depicting the facts.

In regard to the objection to the testimony of Merlyn Mohr set out in paragraph 15, it was the understanding of the Court that the information sought was not within his personal knowledge, was hearsay and was not exculpatory.

In paragraph 16 of the motion, complaint is made that the witness William Hargrave was not produced as a State's witness and he was not allowed to testify as to conversations with the defendant. This was

an attempt on the part of the defendant to put in evidence on behalf of the defendant by means of a witness who is not put under oath or subject to cross examination.

The complaints in paragraph 17 in A and B were outside of the direct examination and were hearsay. The Court felt that the item set out in C was material under a proper search warrant. See rulings on suppression of evidence. In item D the witness was an expert and was entitled to give his opinion, and there was sufficient foundation to back up said opinion.

In regard to paragraphs 18 and 19 the Court knows of no rule that would prohibit a witness testifying, and if he testifies

contrary to his prior testimony before the grand jury, the defendant had the right to cross examine him in this regard and impeach him.

In regard to paragraph 23 the State does not have to present all of the witnesses who appeared before the grand jury. See State vs. Stump, supra, State vs. Hudson, 110 Iowa 683, 80 NW 232. State vs. Helm, 92 Iowa 540, 61 NW 246. State vs. Dillon, 74 Iowa 653, 38 NW 525.

In regard to paragraph 24 discussion was had as to a stipulation in regard to oranges and apples. This was prior to the introduction of a letter without objection from the mother of the decedent

concerning said fruit. The following day the State allowed the letter in evidence but refused to stipulate, stating that the State could not positively state that this was the fruit that was on the murder scene, and, more particularly, that there was an orange missing from this fruit referred to in the letter.

Defendant did not offer any evidence showing that the fruit was a material, relevant factor in this action.

Defendant complains in paragraph 26 concerning the testimony of John Reding. The Court believes that this was proper rebuttal evidence. The testimony of Robert D. Jones was that a man who appeared to be a casual acquaintance of the deceased

got off the elevator with her on the 4th floor. He gave the description of a man of the size and identification of Reding. Reding's testimony showed that he was on the elevator at approximately the same time, and that the girl on the elevator was carrying a basket, which was corroborated by one of the other witnesses. It was proper to show that he apparently was the person referred to by Mr. Jones, that Reding disputed Jones as to the floor on which he got off, and that he was not a casual acquaintance of the deceased. Rebuttal witnesses need not be listed on the Indictment. State vs. Kappos, 189 N.W 2d 563.

The order of October 12, 1973 concerned

witnesses that the State intended to call under Code Section 780.10, and did not apply to rebuttal witnesses.

In regard to the testimony of Rosemary Jones, certain objections are detailed in paragraph 27 of the motion. She was not called as a witness by the State, even though she had testified before the grand jury. She was defendant's witness. Defendant's lawyer had interviewed her prior to trial. It may have been unfortunate that this matter occurred, but the Court cannot see that the State was in any way responsible. The Court believes that this was proper cross examination and that it was correct in allowing the State to reopen for the purpose of further

cross examination.

Without going into the question of immunity, the defendant was entitled to know that an offer of immunity had been made. It did not add to her credibility.

This witness stated that she had not told the truth because she was scared. This statement was not precipitated by an inquiry by the State, but was a volunteer statement. She did not say whey she was scared or imply that she was scared of defendant.

In regard to paragraph 32, the names of the people listed in the grand jury Indictment are not material. See State vs. Dillon, 74 Iowa 653, 38 NW 526.

In regard to the claimed error in

suppressing the evidence taken from James Hall's room, the Court rules as it previously did on April 4, 1974, for the same reasons.

DIRECTED VERDICT - NOT SUFFICIENT EVIDENCE

Paragraphs 25, 31, 37 and 38

In regard to the sufficiency of the evidence, the Court finds that the evidence created more than suspicion. It, in fact, pointed to the defendant. The evidence revealed there was a death by force, the hair of the deceased was wetted after the attack, and defendant's thumbpring was on the faucet at the sink where the deceased's head and hair apparently was washed. Said print was at a spot likely to be removed by subsequent use

of the faucet.

Further, there was a hair consistent with that of the defendant on the blouse of the deceased, and there was hair consistent with that of the deceased on a tennis shoe of the defendant. Defendant was placed at the scene of the crime at the time. The Court believes that there were sufficient facts for the jury to act on, and it was a question of fact to be determined by them.

The defendant's rights under the constitution were protected throughout the trial. Great effort was made during the trial to hold hearings in chambers, to allow objections to be made outside the hearing of the jury, to avoid reference

to the other criminal charges against the defendant. The Court previously has set out that any improprieties before the grand jury would go to setting aside the grand jury Indictment before plea, and that a petit jury has passed on the merits of the defendant's guilt or innocence.

This has been a lengthy, prolonged procedure, before trial and during trial, and great effort has been made throughout the entire case to protect the defendant from adverse publicity which might have reached prospective jurors, by protective orders and by keeping many of the evidentiary matters prior to trial in a sealed file. At defendant's insistence and resistance to the State's motions for change

of venue, this Court allowed the case to be heard in Johnson County, rather than granting a change of venue, and allowed the matter to go to trial rather than continuing the same. This Court recognizes that matters occurred during trial that can be disadvantageous to certain parties, and that no trial is perfect. However, the Court believes that every effort was made to provide a fair trial in this case, which was accomplished.

COURT'S MISCONDUCT

Paragraph 30

There was no part of the record that would inform an appellate court as to the reasons for paragraph 30. The Court states that upon being informed that electronic

equipment was being brought into the court room, and that many bulky containers were coming into the court room which could contain other matters concerning the safety of the trial and the participants, the Court instructed the bailiff that he might ask that such carrying bags and briefcases be inspected prior to the entry of people into the court room. The information the Court received was from a former law student assistant to the District Court.

The jury had been segregated to a special room and normally came in after spectators were admitted to the court room. The Court has no knowledge of any juror seeing or not seeing or hearing a request by the bailiff to open a container of the type

previously mentioned.

The Court believes that it has the right and duty to protect the orderliness of the trial and enforce its court rules, and that it was done in such a manner that there was no prejudice to the defendant.

INSTRUCTIONS

Paragraphs 34, 35, 36 and 40

In regard to requested instructions 21, 22 and 23, they tend to comment on certain evidence, which the Court felt was improper.

In regard to Instruction No. 18, the Court believes that it is a correct statement of the law.

The Court did not instruct on impeachment, nor was it requested. No objection was made to Instruction No. 14, and the

Court does call attention to the fact that in the reasonable doubt instruction the Court did include the words "on the part of the defendant" which were not requested by the defendant.

PROSECUTOR'S MISCONDUCT

Opening Statement
Paragraph 33

Misstatements made by the prosecutor in the opening statements, in the view of the Court, were not prejudicial to the defendant. There was no indication that they were intentionally made, and the jury was warned during the opening statements, by the Court, that they were to consider only the evidence presented at time of trial.

Concerning the statement as to the

interview with the defendant by Officer Jutte, the Court on its own motion called to the bench the prosecutor and defense lawyer and asked the prosecutor not to go into the statement. This statement had not been suppressed, but the Court felt it might objectionable on other grounds.

In regard to the statement made concerning Hall's presence in the building, the Court believes the prosecutor meant in the room where the body was found. Both the prosecutor and defendant were aware that Roberson had testified before the grand jury concerning defendant's presence in the building, and no objection was made to the statement at the time.

Production of Photographs
Paragraph 39

Defendant's objection in paragraph 39 as to production of photographs was taken up several times by the Court. The State insists that they turned all of the photographs over to the defendant, and the Court's recollection of Barton's testimony is that he was unsure as to photographs made. There were other photos made prior to his arriving at the scene which were available to the defendant. The Court sees no prejudice to defendant.

Evidence
Paragraphs 20, 21, 22 and 41

Objection was made to the State's exhibiting a shoe of the defendant preparatory to asking the witness Schnetzler

a question, which objection the Court sustained, much to the surprise of the prosecutor. There was no flagrant exhibition nor did it become a continuing thing, and the prosecutor apparently felt that his question was proper, and still does. The Court does not believe that there was any prejudice to the defendant by any act of the prosecutor.

Defendant further objected in paragraph 21 to the prosecutor's exhibiting to the jury the sketch produced by the defendant marked Defendant's Exhibit "EE". The prosecutor picked up the sketch to exhibit the same, but the Court promptly stopped him. The Court did not see any act or conduct which would have been pre-

judicial to the defendant. This sketch had been exhibited prior to this by the defendant's counsel.

The act objected to in paragraph 22 appeared to the Court to be an innocent act on the part of the prosecutor. The exhibit came into evidence and was sent to the jury room. The Court sees no prejudice to the defendant.

The Court does not agree with the defendant in regard to his paragraph 41. It appeared to the Court that the question was slightly speculative, and further that the damage that a heavy tennis shoe might do was as much within the knowledge of the jurors as the witness. However, as the pathologist is an expert in this matter the

Court believes it would have been entirely proper for the opinion to have been given. The least that could be said is that the prosecutor had every reasonable expectation that the question and answer would go into evidence. The proof presented by the prosecutor shows what the answer would have been. The fact that there was some conflicting testimony before the grand jury would have been a matter of cross examination. The prosecutor's explanation that at the time of the grand jury testimony the doctor was referring to a light tennis shoe rather than a heavy gym shoe is entirely plausible. The Court sees no prejudice to the defendant on this ground.

Arguments
Paragraphs 20 and 43

No objections were made as to 29 a, B and C, at the time of arguments and no cautionary statements or instructions were requested. In subparagraph B the defendant invited the comment made by the State. See State vs. McClain, 125 NW 2d 764 and State vs. Sage, 162 NW2d 502, 504. In regard to sub-paragraph B the Court believes the prosecutor did not do this as a matter of personal opinion, but as a matter of reasonable probability as to what happened. In paragraph B, if there were inaccuracies they were of a minor nature, the jury heard the evidence, and it is not grounds for a new trial. State vs. Christiansen,

193 Iowa 56, 186 NW 462. The Court further sees no misconduct nor is it necessary to draw the same inferences that the defendant did.

JURY MISCONDUCT

Paragraphs 28, 44 and 45

In regard to juror Housel it was apparent from the voir dire, which the defendant went into extensively, that he had some knowledge of the case by hearsay. Apparently defendant felt that the knowledge of the juror was to his benefit. The Court was made aware of the juror's problems and brought this to the attention of counse. Defendant did not feel at that time that the juror should be contact- by the Court.

There is no showing that the juror in any way contaminated the other members of the jury or that he discussed the facts or imparted his pretrial knowledge to any member of the jury. He was replaced and did not sit on the deliberation, and the Court sees no prejudice to the defendant.

The Court observed during the picking of the jury frank answers and a good attitude on the part of the prospective jurors. During the trial he noticed intense concentration of the jury as to the evidence. It is unfortunate that the use of intoxicants before and during the dinner was allowed. The question involved is whether or not this deprived the defendant of a fair trial. The Court does

not believe that it did. This jury returned into the court room very solemnly and it was apparent that their decision weighed heavily upon their shoulders from their conduct and demeanor. Even the defendant does not claim that the jurors were intoxicated.

The Court is quite aware of State v. Baldy, 17 Iowa 39 and Ryan vs. Harrow, 27 Iowa 494, which held positively that the use of intoxicants was misconduct which required that the verdict be set aside and a new trial granted. This was true regardless of whether or not it affected their deliberations. Without advocating, and at this point denouncing, the use of intoxicants by a jury, the Court points out that

this was a different era in our history. The latest Iowa case, State vs. Phillips, 212 Iowa 1332, 236 NW 104 states that the drinking of beer was a matter of fact for the trial court to determine, particularly the extent and the effect of the alleged drinking. Thus, Iowa has abandoned the strict rules as set out previously. The Court does not believe that the consumption of the alcoholic drink that eight members of the jury had with their dinner had any effect upon theirdeliberations, or that it prejudiced the defendant in any way.

The defendant raises in paragraph 45 the fact that the jury had driven by Rienow Hall on their way to dinner. Rienow and Slater are large dormitories which may be

seen quite easily from the courthouse area. There is no showing that they inspected the buildings or went to the room and the location of Rienow and Slater Hall was not a matter of dispute in the evidence nor a material issue in the case.

The Court sees no prejudice to the defendant.

Defendant, in final argument, calls attention of the Court to the cumulative effect of the many claimed errors. The pretrial matters were extensive and trial was long. Defense counsel have been zealous, thorough, and skillful. Considering these factors, the extent or ratio of the claimed errors is not great. I can only conclude that the defendant,

in my opinion, has received a fair trial. Accordingly, all of defendant's motions are overruled.

Sentencing is set for 2:30 p.m. July 3, 1974.

Dated this 2nd day of July, 1974.

_____
Judge, 6th Judicial District
of Iowa

Co. Atty.
Ass't Atty. Gen.
Woodward
Wm. M. Tucker

IN THE SUPREME COURT OF IOWA

STATE OF IOWA)
Appellee,)
)
vs.) 164
) 57467
JAMES WENDELL HALL,)
Appellant.)

Filed November 12, 1975

Appeal from Johnson District Court -- Louis W. Schultz, Judge.

Defendant appeals from judgment sentencing him to serve a term of 50 years in the penitentiary following his conviction of second degree murder.

AFFIRMED ON CONDITION AND REMANDED WITH INSTRUCTIONS.

William M. Tucker and Bruce L. Walker, both of Iowa City, for appellant.

Richard C. Turner, Attorney General, Gary A. Ahrens, Nancy J. Shimanek, and John Grant Mullen, Assistant Attorneys General, and Carl Geotz, Johnson County Attorney, for appellee.

Heard en banc.

LeGrand, J.

Defendant was charged under Section 690.1, The Code, 1973, with the unlawful killing of Sarah Ann Ottens. A jury found him guilty of second degree murder. Subsequently defendant was sentenced under Section 690.3, The Code, 1973, to serve a term of 50 years in the penitentiary, a judgment from which he now appeals. We affirm on condition and remand the case for further inquiry according to the instructions in Division IX hereof.

Although we save a detailed discussion of the facts for presentation later as we consider the issues raised, we give now a brief outline of the circumstances under which this crime was committed.

Defendant and Sarah Ann Ottens, each 19 years old, were students at the University of

Iowa, During the University's spring vacation in 1973, the campus population was depleted, but defendant and Miss Ottens were among those who stayed on during the scholastic break. There is no evidence they knew each other.

On March 13, 1973, Miss Ottens' dead body was found in Room 429 of Rienow Hall, a university dormitory. An autopsy disclosed she had died of asphyxiation by strangulation. Apparently the murderer had held a broom handle against her throat, a maneuver which medical testimony established could cause death within one minute. Her body was nude from the waist down, and she had been brutally beaten and assaulted.

However, there is no evidence of sexual attack.

Defendant lived in Slater Hall, a dormitory across the street from Rienow Hall. There is evidence from which the jury could have found he was in the victim's room in Rienow Hall at or near the time the murder occurred. We refer to this testimony in greater detail later.

Defendant has set out more than 40 claimed errors, raising the following issues, which we will consider in the order listed:

I. Irregularities and errors in the grand jury proceedings;

II. Refusal to order production of evidence;

III. Error in overruling defendant's motion for directed verdict;

IV. Error in ruling on defendant's motion to suppress and motion in limine;

V. Errors in evidentiary rulings;

VI. Errors in the instructions, both as to those given and as to those refused;

VII. Prosecutorial misconduct; and

VIII. Jury misconduct.

I. Grand Jury Proceedings

One of the most serious complaints-and certainly the one most vigorously argued-centers around the grand jury proceedings. Defendant raised these matters in several ways. First, he filed a motion to set aside the indictment before entering a plea, as required by Section 776.1, The Code. This was overruled.

After a motion for bill of particulars had been partially sustained and additional partic-

ulars had been furnished, defendant filed another motion to set aside the indictment as he is then permitted to do by Section 773.7, The Code. This motion, too, was overruled.

He later made alleged grand jury irregularities a ground for relief in his motion for new trial filed after his conviction.

Defendant's argument is more than a complaint about proceedings in this case. It constitutes an impassioned assault on the grand jury system generally. He says it is archaic, oppressive and simply a tool to be manipulated as the prosecutor sees fit. Such criticisms of the grand jury are not new, although recently they have been increasing in both frequency and severity. See The Grand Jury-Prosecutorial Abuse of the Indictment Process,

65 J. of Crim. Law and Criminology, 157-169 (1974); Johnson v. Superior Court, 124 Cal. Rptr. 32, 539 P. 2d 792 (1975), concurring opinion.

Be that as it may, it appears the alternative facing defendant, if we could by some hidden judicial power abolish the grand jury, would be even worse. The only other way in which one charged with a crime may be brought to trial is on county attorney's information. See Section 769.1, The Code. If, as defendant argues, the county attorney may impose his will upon the grand jury, the filing of an information to start prosecution is even more subject to that criticism, being completely within his discretion, except for the provisions of Section 769.2, The Code. It is

perhaps unnecessary to point out this argument must be directed to the legislature, not us.

The manner in which an indictment may be set aside is regulated by statute. Section 776.1 provides as follows:

> "The motion to set aside the indictment can be made, before a plea is entered by the defendant, on one or more of the following grounds, and must be sustained:
>
> "1. When it is not endorsed ' a true bill' and the endorsement signed by the foreman of the grand jury as prescribed by this Code.
>
> "2. When the names of all witnesses examined before the grand jury are not endorsed thereon.
>
> "3. When the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith.
>
> "4. When it has not been presented and marked 'filed' as prescribed by this Code.
>
> "5. When any person other than the grand jurors was present before the grand jury when the question was taken upon the find-

ing of the indictment.

"6. When any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law.

"7. That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law, except as hereinafter provided."

Except on constitutional grounds (which we discuss later), the statutory grounds for setting aside an indictment are exclusive and only those which are listed may be the basis for such action. State v. Olson, 249 Iowa 536, 554, 86 N.W.2d 214, 221 (1958); State v. Lamb, 239 Iowa 176, 179-180, 30 N.W.2d 734, 736 (1948); State v. Boucher, 237 Iowa 772, 777-778, 23 N.W.2d 851, 854 (1946).

Defendant's motion, made before entering his plea, was limited to two grounds as follows:

"1. That the minutes of testimony attached to the indictment do not contain particulars constituting the offense charged in the indictment;

"2. That the minutes of testimony attached to the indictment do not show that the defendant committed the offense charged in the indictment."

Since neither of these is among the statutory grounds for setting aside an indictment, this motion was properly overruled.

Our statutory law also provides a defendant may ask for a bill of particulars if the manner in which he is charged is insufficient to "enable him to prepare his defense, or to give him such information as he is entitled to under the constitution of this state." Section 773.6, The Code.

If such a bill of particulars is ordered by the court, defendant may thereafter move

again to set aside the indictment under the provisions of Section 773.7, which we here set out in full:

> "If it appears from the bill of particulars furnished under section 773.6 that the particulars stated do not constitute the offense charged in the indictment, or that the defendant did not commit that offense, or that a prosecution for that offense is barred by the statute of limitations, the court may and on motion of defendant shall set aside the indictment unless the county attorney shall furnish another bill of particulars which so states the particulars as to show that the particulars constitute the offense charged in the indictment and that the offense was committed by the defendant and that it is not barred by the statute of limitations."

A bill of particulars was furnished in this case, and defendant availed himself of Section 773.7 in a second effort to have the indictment set aside. This time his motion included 10 numbered paragraphs, argumentative in form,

challenging the sufficienty of the evidence upon which the indictment was based, alleging that much of the evidence introduced before the grand jury would be inadmissible at trial, and urging that the indictment be set aside.

Only this one paragraph of the motion comes within the purview of Section 773.7:

> "The admissible testimony and even all of the testimony as shown by the indictment and bill of particulars failed to show that the defendant committed the offense charged."

The trial court ruled, rightly, that the indictment should not be dismissed, and defendant's motion was accordingly overruled.

It is interesting to note that defendant at this point had not yet raised the constitutional issues of equal protection and due process which he now so strenuously urges upon

us. They were first introduced into this case in defendant's motion for new trial filed after conviction and before sentencing, where he set out these new complaints concerning the grand jury proceedings:

(1) Failure of the State to comply with the provisions of Section 771.13, The Code, relating to the filing of exhibits used in connection with the grand jury proceedings;

(2) Failure of the State to attach to the indictment the names and minutes of testimony of all witnesses who testified before the grand jury;

(3) Introduction of evidence before the grand jury on matters wholly unrelated to the charge which they were then investigating and which were so prejudicial as to violate de-

fendant's rights of equal protection and due process under the Federal Constitution and the Constitution of the State of Iowa;

(4) An allegation that the alleged minutes attached to the indictment were not the minutes as required by law, which clearly called for production of a full court reporter's transcript of testimony; and

(5) That the grand jury indictment was based upon inadmissible evidence which was prejudicial to defendant and violated defendant's constitutional rights of equal protection and due process.

The argument that specific statutes were violated by the manner in which the indictment was returned and the exhibits and minutes filed will not be considered. In the first place, we have held such sections to be

directory only and not mandatory. State v. Kroll, 244 Iowa 173, 179, 55 N.W.2d 251, 255 (1952) and citations; State v. Bading, 236 Iowa 468, 475, 17 N.W.2d 804, 808 (1945). We have also held that the requirement that minutes be attached to the indictment means only minutes as to the material evidence and need not include the minutes of all witnesses who appeared, some of whom will not be called to testify. State v. Schlater, 170 N.W.2d 601, 605 (Iowa 1969); State v. Stump, 254 Iowa 1181, 1198, 119 N.W.2d 210, 220 (1963); State v. Stafford, 237 Iowa 780, 782-783, 23 N.W.2d 832, 834 (1946).

These are all matters which cannot be raised now, either because they are not among the statutory grounds for setting

aside an indictment or, if they are, because defendant did not assert them in either motion to set aside the indictment. State v. Schlater, supra, 170 N.W.2d at 606-607;
State v. Boucher, supra, 237 Iowa at 777, 23 N.W.2d at 854;
State v. Stafford, supra, 237 Iowa at 782, 23 N.W. 2d at 834;
State v. Bading, supra, 236 Iowa at 475, 17 N.W. 2d at 807.

However, there remains the larger issue raised by defendant's claim he was denied his constitutional right to equal protection and due process. While there may be some doubt defendant raised these issues at the earliest opportunity, as we have said he must do in State v. Maestas, 224 N.W. 2d 248, 250 (Iowa 1974); State v. Boer, 224 N.W.2d 217, 218

(Iowa 1974); and State v. Ritchison, 223 N.W. 2d 207, 214 (Iowa 1974), we nevertheless consider this matter on its merits because of the grave crime involved and the serious charges made.

In doing so, we refer back to the early part of this division in which we discussed defendant's charges the grand jury system is merely a tool controlled by the whim of the prosecutor. It is claimed that is what happened here. Defendant bitterly assails Assistant Attorney General Gary Woodward, who handled the grand jury proceedings, for injecting incompetent, irrelevant and prejudicial testimony which bore no relationship to the matter then before that body. It is also alleged he made numerous gratuitous

statements attacking defendant's character and setting out irrelevant past conduct which could only be prejudicial.

Many of these accusations are borne out by the record. We agree with defendant's counsel that the prosecutor exceeded the bounds of propriety. His duty in grand jury proceedings is to fairly and dispassionately present not only that evidence which tends to prove guilt but also that which is exculpatory in nature. He should not attempt to improperly influence or sway the deliberations or to induce a result he desires. Many years ago, we said that grand jury powers should not be used as "an instrument of oppression." Hobson v. District Court of Linn County, 188 Iowa 1062, 1065, 177 N.W. 40, 41 (1920). Recently,

we have criticized conduct similar to that engaged in here by the prosecutor in State v. Hansen, 215 N.W.2d 249, 259-251 (Iowa 1974). See also State v. Good, 10 Ariz. App. 556, 460 P. 2d 662, 665 (1969).

However, ordinarily prosecutorial misconduct alone should not be the basis for setting aside an indictment or voiding a verdict. It is not the misconduct which entitles defendant to relief, it is the prejudice which results therefrom, making it impossible for defendant to have a fair trial. Cf. State v. Blyth, 226 N.W.2d 250, 271 (Iowa 1975).

Significant to our inquiry in this regard is the following statement from United States v. Calandra, 414 U.S. 338, 344-345, 349, 94 S. Ct. 613, 38 L.Ed.2d 561, 569, 572 (1974):

> "The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character
>
> "* * *
>
> "Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial."

See also State v. Hiatt, 231 Iowa 643, 650, 1 N.W.2d 736, 740 (1942).

Several other principles are important in our consideration of the constitutional issues raised. Ordinarily, we will not consider the sufficiency of evidence considered by the grand jury. State v. Kobrock, 213 N.W.2d 481,483 (Iowa 1973); State v. Lamb, supra, 239 Iowa at 180, 30 N.W.2d at 736; State v. Boucher, supra, 237 Iowa at 777, 23 N.W.2d at 854.

Furthermore, as we have previously

mentioned, the only grounds upon which an indictment may be set aside are statutory and are controlled by Sections 776.1 and 773.6. However, we have recognized, at least obliquely, that these statutory provisions must give way, under certain circumstances, to constitutional safeguards. In State v. Olson, supra, 249 Iowa at 547, 86 N.W2d at 221 we said:

> "We have repeatedly held an indictment may be set aside only on grounds enumerated in statutes. Sections 776.1, 773.6 ***
>
> "Defendant argues the district court had inherent power to set aside the indictment on a ground not specified in the statutes and should have exercised it here. We need not determine whether such power exists in an exceptional case in order to prevent oppression or violation of constitutional rights. If it be assumed the power exists, a proper case for its exercise has not been shown here. See in this connection State v. Manly, 197 Iowa 46, 48-49, 196 N.W. 724; State v. Baughman, supra, 111 Iowa 71, 73, 82

N.W. 452." (Emphasis added.)

We believe this statement accurately predicted that we would set aside an indictment on non-statutory grounds upon a showing that constitutional rights had been violated. It is in this context that we consider defendant's constitutional objections.

This matter can be resolved only by a consideration of all the facts and by our own independent evaluation of the totality of the circumstances. We have reached this same conclusion in considering constitutional questions in many recent cases. See State v. Cullison, 227 N.W.2d 121, 126-127 (Iowa 1975); State v. Winfrey, 221 N.W.2d, 269, 272 (Iowa 1974); State v. Thomas, 205 N.W. 2d 717, 721 (Iowa 1973); State v. Fetters,

202 N.W.2d 84, 90 (Iowa 1972); Pollard v. District Court, 200 N.W.2d 519, 520 (Iowa 1972) State v. Niccum, 190 N.W.2d 815, 822 (Iowa 1971).

These cases dictate the procedure to be followed here-an independent evaluation of the totality of the circumstances in order to determine whether defendant's constitutional right to equal protection and due process has been violated.

We have reviewed the grand jury proceedings and have fully considered defendant's objections to the manner in which the grand jury inquiry was conducted by Mr. Woodward.

We come away from that appraisal with two firm conclusions. The first is that the prosecutor presented a considerable mass

of evidence which had no proper place in the grand jury's investigation. He made frequent statements which were improper and violative of his obligation to present the matter impartially and with no attempt to influence the action of the grand jury. We express unqualified disapproval of that practice.

However, none of these facts was known to the jury which convicted defendant: That body heard only competent, relevant testimony admissible against defendant under tested rules of evidence.

The quotation from United States v. Calandra already set out is uniquely applicable here.

Our second conclusion is that under this record defendant was not denied due process

or equal protection under the federal or Iowa constitutions.

II. Production of Evidence

Although much of defendant's request for production of evidence was granted, he asserts he should have been accommodated even more. He claims he was denied pretrial access to information and material vital to the defense of the charge against him.

This case was tried prior to our decision in State v. Peterson, 219 N.W.2d 665 (Iowa 1974). Defendant concedes that decision has no application.

Defendant filed a motion for bill of particulars, which really was a motion for production of evidence. Although we have said this is not the proper method in which to obtain information before trial (State v. Lass, supra, 228 N.W.2d at 765), both court

and counsel treated the motion as one calling for the production of evidence. We do likewise.

The motion was long and detailed. It contained 38 numbered requests, many of them with numerous subdivisions. After a hearing on the motion, the trial court entered an order directing the State to furnish defendant the following:

(1) Copies of all plats and sketches and copies of all written reports containing an analysis of physical evidence and scientific tests;

(2) Description of all items of real evidence pertaining to the commission of the alleged offense and of any real evidence in the possession of the State, whether or not it was to be used in the event of trial, together

with an opportunity for him to examine same;

(3) Copies of all photographs relating to the commission of the alleged offense;

(4) Specific and detailed factual information concerning the testimony of 29 separate potential witnesses;

(5) Copies of written statements obtained by the State in the investigation of the case;

(6) Copies of all written statements obtained by the county attorney in his separate investigation; and

(7) A statement of names and addresses of "all witnesses the county attorney intended to call in the trial of this case and the substance of the testimony sought to be elicited from each witness;" also "additional information of the same nature as it is obtained in the future concerning other witnesses

up to and including the date this matter is submitted to a jury for a determination of innocence or guilt of the accused."

We believe the trial court was quite sensitive to defendant's needs and granted substantially all of his requests except those which demanded the turnover of virtually the entire State file by seeking all written reports pertaining to the investigation of the case and copies of any recordings, tapes, written statements of witnesses or other memoranda pertaining to or having any bearing upon the commission of the alleged defense.

We have consistently rejected such broad and sweeping demands as being both too vague and too general. We hold the trial court's

ruling was consistent with and justified by State v. Lyons, 210 N.W.2d 543, 547 (Iowa 1973); State v.Houston, 209 N.W.2d 42, 46 (Iowa 1973); State v. Aossey, 201 N.W.2d 731, 734 (Iowa 1973), cert. denied 412 U.S. 906, 93 S. Ct. 2292, 36 L.Ed.2d 971; State v. Niccum, 190 N.W.2d 815, 826-828 (Iowa 1971) and State v. Eads, supra, 166 N.W.2d at 773-774.

Several of defendant's complaints in this area concern the State's alleged failure to comply with the trial court's order to produce rather than order itself. This, of course, presents a quite different problem. The trial court had the duty-and the ability-to compel the State to obey its order; but it cannot do so unless the alleged failure to obey is brought to its attention in timely fashion.

Two items of potential evidence are involved. One concerns a fingerprint (not the one from the faucet); the other deals with a number of photographs allegedly taken by one of the investigating officers.

Defendant now asserts a reproduction of the fingerprint found on a matchbook cover was not given for comparison purposes. He also says the State refused to turn over a number of photographs in its possession. He says, and we agree, this is matter he was entitled to under the trial court's order to produce evidence.

Although the record is somewhat obscure, it seems the State insists the disputed fingerprint was not sufficiently clear to provide a basis for comparison. It was not used at trial. Defendant argues he should have

been the one to decide if the print would be helpful to his defense.

We agree with the trial court that defendant waived his right to insist on production of the fingerprint by failing to raise the State's failure to produce it until the time of trial. See State v. Cunha, 193 N.W.2d 106, 111 (Iowa 1972).

Concerning the disputed photographs, the trial court found there was considerable uncertainty about how many pictures were taken and by whom. The State insisted it had turned over all the photographs it had. The trial court found there was no evidence any pictures had been withheld. The court also found the additional pictures whose existence the State denied simply depicted the death room and other

photographs of that area were already available for defendant's use.

There was no abuse of discretion in the trial court's ruling there was no showing the State had violated the order to produce evidence.

Defendant's most strenuous objection to the trial court's ruling on his motion for the production of evidence deals with his unsuccessful demand for copies before trial of the complete transcript of testimony of witnesses appearing before the grand jury. The gist of his complaint is that Sections 772.3 and 772.4, requiring minutes of testimony to be attached to the indictment and copies furnished to defendant, entitle him to the verbatim transcript of their testimony. Defendant admits

such a record need not have been kept; but, since the evidence was recorded by a court reporter, defendant argues his transcribed notes became the minutes of testimony.

We do not agree. We have construed minutes to consist of summarized statements of what the witnesses said before the grand jury. See State v. Frommelt, 159 N.W.2d 532, 536 (Iowa 1968); State v. Johnson, 259 Iowa 599, 603, 145 N.W. 2d 8, 10 (1966); Annot. 20 A.L.R. 3d 7 (1968); Black's Law Dictionary. Rev. 4th Ed. (1968), page 1149.

Defendant was not entitled to the production of the transcript of the grand jury testimony under Sections 772.3 and 772.4.

Of course, defendant's right to use the transcript of a witness' grand jury testimony for purposes of cross-examination is a different matter. Despite defendant's protests to the contrary, we find he was given every possible consideration in this respect. The trial court was careful to follow the guidelines set out in State v. Deanda, 218 N.W. 2d 649, 651-652 (Iowa 1974) and State v. Houston, supra, 209 N.W.2d at 46.

The record fully bears out this statement by the trial court in ruling on defendant's motion for a new trial:

> "Although this court did not allow the defendant to obtain the entire transcript

> of the grand jury testimony, it did allow him to have the transcripts of those witnesses called by the State before cross-examination. The court did delete a few pages from said transcripts that contained hearsay, conversation of the grand jurors and the prosecutor, and other immaterial matters that were not exculpatory in nature toward the defendant. By pretrial order and as a practice during said trial, it was not called to the attention of the jury that the defendant was put in a position that he had to object to or delay the trial by obtaining the said transcripts. Many of the transcripts were given in advance to the defendant before the examination of the party called as a witness, others were given at recesses, or the other defendant agreed that he would recall the witness for further cross-examination in the event he found matters in the grand jury transcript that he wished to cross-examine on."

There was no error in the manner in which the transcripts were handled for purposes of cross-examination.

III. Motion for Directed Verdict

Defendant moved for a directed verdict at the end of the State's case and again at the end of all the evidence. In both instances, the motion was overruled and, we believe, rightly so.

Defendant argues the evidence was insufficient to sustain a conviction. It is quite true, as defendant argues, that most, if not all, of the evidence was circumstantial. To support a conviction based on circumstantial evidence, it is necessary that the circumstances be entirely consistent with defendant's guilt and wholly inconsistent with any rational hypothesis of innocence. It must be so convincing as to exclude a reasonable doubt that defendant was guilty of the offense charge.

The proof must generate something more than suspicion, speculation or conjecture. State v. Blyth, 226 N.W.2d 250, 268 (Iowa 1975); State v. White, 223 N.W.2d 163, 164 (Iowa 1974); State v. Sellers, 215 N.W.2d 231, 232 (Iowa 1974); State v. Jellema, 206 N.W. 2d 679, 681 (Iowa 1973); State v. Schurman, 205 N.W. 2d 732, 733-734 (Iowa 1973).

Several rules have been consistently adhered to in considering such motions based on insufficiency of the evidence. First, we view the evidence in the light most favorable to the State, including all inferences and presumptions which flow from the evidence in the record. State v. Hansen, 225 N.W.2d 343, 348

(Iowa 1975); State v. Staker, 220 N.W.2d 613, 618 (Iowa 1974). Furthermore, a finding of guilt is binding on us unless it is without substantial support in the evidence. State v. White, supra, 223 N.W. 2d at 164; State v. Jellema, supra, 206 N.W.2d at 681; State v. Cartee, 202 N.W. 2d 93, 96 (Iowa 1972).

Defendant argues there is nothing to associate him with this crime except a print of his thumb found in the dead girl's room. This, he says, is insufficient since there is no showing when, nor the circumstances under which, it was impressed there. Not only does defendant underestimate the importance of this evidence, but he also overlooks completely

other evidence which, combined with the print, made it incumbent upon the trial court to submit the question of defendant's guilt to the jury.

In the first place, this is not just any random fingerprint. It is a fingerprint found on a water faucet, the basin of which was still half filled with bloody water, in the room where Miss Ottens' mutilated body was discovered. Like all evidence, the probative value of fingerprint evidence depends upon the circumstances surrounding its discovery. State v. Sellers, supra, 215 N.W.2d at 232; United States v. Van Fossen, 460 F.2d 38, 40-41 (4th Cir. 1972);

United States v. Cary, 470 F.2d 469,471 (D.C. Cir. 1972). Application of that test here lends unusual force to this physical evidence.

In addition to the fingerprint evidence, there was also evidence a hair consistent with the victim's was found on a tennis shoe taken from defendant's room and a hair consistent with his was found on her blouse. The admission of this evidence was strenuously objected to and is discussed elsewhere in this opinion. Since we there hold it to be admissible, we consider it here as supportive of the State's case.

Furthermore, two witnesses, Earnest Roberson and Rosemary Jones, placed defendant in Rienow Hall at the time the jury could have found Miss Ottens' death occurred. While defendant argues Rosemary Jones' testimony was not only improperly admitted but was entitled to no credibility, he cannot say the same as to Roberson. Even as to Mrs. Jones' testimony, while we agree it was suspect, the jury could have found it credible.

Roberson was a friend and acquaintance of defendant. Like Miss Ottens, he lived in Rienow Hall. On the evening of the murder, he received two telephone calls from defendant,

presumably made from Slater Hall, asking that Roberson let him into Rienow Hall, which was kept locked during certain hours. However, when Roberson started for the ground floor to open the door for defendant, he almost immediately met him on the stairway between the fourth and fifth floors. He testified unequivocally the time lapse was such that defendant could not have made the telephone call from Slater Hall and still reached Rienow Hall, even assuming someone else had let him in. It was permissible for the jury to find defendant was already in Rienow Hall when he made the calls to Roberson, a fact he was trying to conceal

by the calls to Roberson.

In considering all the evidence-defendant's presence in Rienow Hall under incriminating circumstances at the critical time, the discovery of compatible hair relating to both the victim and himself, the testimony of Roberson and Mrs. Jones, and the presence of the fingerprint-we believe there was substantial testimony from which the jury could find defendant guilty.

The case was properly submitted to the jury.

IV. Motion to Suppress Evidence

Prior to trial, defendant filed a motion to suppress evidence. It was overruled. Although not necessary to preserve error, State v. Liesche, 228 N.W.2d 44, 46 (Iowa 1975), defendant unsuccessfully renewed his objections when the challenged evidence was offered at trial. Defendant assigns the admission of this evidence as error.

Several months after the commission of this crime, a search warrant issued authorizing the search of defendant's room in Slater Hall for the purpose of seizing "a blue charge card, clothing and personal belongings of Sarah Ann Ottens, and clothing and personal belong-

ings of James Wendell Hall which had blood stains on them."

A search of the room was conducted under the authority of this warrant and among the items seized was a pair of white tennis shoes suspected of being bloodstained. The dispute here centers around the admissibility of a hair found imbedded under the laces of one of these shoes which, upon analysis, was found to be consistent with hair samples taken from the head of Sarah Ann Ottens.

Defendant argues this evidence should have been suppressed. He asserts, first, that the warrant was issued without probable cause and that any evidence seized under it is rendered inadmissible thereby and, secondly, he

insists the hair was inadmissible in any event for the following reasons:

(1) it was not one of the items mentioned in the information for search warrant;

(2) it was not enumerated in the search warrant itself; and

(3) it was not listed on the return made by the officer who executed the warrant.

Several other objections to the warrant and the ensuing search are urged on appeal, but they were not raised in the trial court. We confine our consideration to those issues properly raised and preserved in the trial court. State v. Ritchison, supra, 223 N.W. 2d at 213.

We find no merit in the argument the hair was inadmissible because it was not listed in either the application or the warrant and was not inventoried in the return on the warrant.

It is true a search warrant must describe with particularity the items to be seized. " Sections 751.4, 751.5, The Code. The executing officer is not permitted to seize one item under a warrant describing another. Berger v. New York, 388 U.S. 41, 58, 87 S. Ct. 1873, 18 L.Ed.2d 1040, 1052 (1967); Trupiano v. United States, 330 U.S. 699, 710, 68 S. Ct. 1229, 92 L.Ed. 1663, 1672 (1948).

The cases relied on by defendant which he

says make this seizure unreasonable are easily distinguishable from the case at bar. Here, neither the warrant nor the search was general or exploratory as was the case in Stanford v. Texas, 379 U.S. 476, 480, 85 S. Ct. 506, 13 L.Ed.2d 431, 434 (1965); nor did the officers seize one item under a warrant authorizing the seizure of another as was done in United States v. LaVallee, 391 F.2d 123, 125 (2d Cir. 1968); People v. Baker, 23 N.Y.2d 307, 296 N.Y.S.2d 745, 244 N.E.2d 232, 237 (1968).

Here the officers were in the process of making a valid search and were entitled to take possession of the tennis shoes under the warrant. We know of no authority, and none

has been cited, which would compel officers to remove from an article rightfully seized all material attached or adhering thereto.

Such a rule would be unreasonable and unrealistic.

Of course, the situation would be different if the officers, having once gained entrance to the room by virtue of the warrant, conducted an extensive and unauthorized search for property not listed in the warrant. No such action occurred here.

Furthermore, seizure of the hair is no doubt also permissible under the plain view doctrine. Once the officers rightfully seized the tennis shoes, the hair was observable. It was then subject to seizure as significant evidence relating to the crime under investiga-

tion. State v. Davis, 228 N.W.2d 67, 70-71 (Iowa 1975); State v. Johnson, 232 N.W.2d 477, 480 (Iowa 1975).

Defendant next insists that the failure to inventory the hair on the return should have excluded it from introduction as evidence. See Section 751.14, The Code. Defendant cites no authority to support his claim. The general rule is that requirements for filing a return showing the property seized is for the protection of the defendant's property rights and not as protection against unreasonable search and seizure under the 4th Amendment. See 68 Am. Jur.2d, Searches and Seizures, Section 83 at 738 (1973). The rule is stated this way in United States v. Kennedy, 457 F.2d 63, 67 (10th Cir. 1972), cert. denied 409 U.S. 864,

93 S. Ct. 157, 34 L.Ed.2d 112 (1972):

> "The overwhelming weight of authority * * * is to the effect that the procedures required for the return of a search warrant are ministerial and, absent a showing of prejudice, irregularities in such procedures will not serve to void an otherwise valid search."

In somewhat different circumstances, we indicated in State v. Wenks, 200 Iowa 669, 670-671, 202 N.W. 753 (1925) that we accept the rationale of this rule. There we said:

> "If it be conceded it was the duty of the officers to give a receipt to the person having possession of the property so taken under a search warrant, the failure to do so would not deprive the State of its evidence nor render said property inadmissible in evidence merely because of the failure to execute such receipt."

Cf. State v. Kaufman, 201 N.W.2d 722, 724 (Iowa 1972).

This leaves for determination the defendant's claim that the warrant was improperly issued

without probable cause. If this is true, the search is invalid and the evidence seized would have been inadmissible. Defendant argues the warrant was issued in violation of defendant's constitutional rights under Amendments 4 and 14 of the Federal Constitution and Article I, Section 8 of the Iowa Constitution.

The State argues such objection is so vague and indefinite that it did not properly raise the issue now relied on. We pass that question and consider the matter on its merits.

An information asking that a search warrant issue was filed by one of the officers engaged in the investigation of this crime. It was supported by two affidavits, one by the

applicant and the other by another officer engaged in the investigation. These affidavits alleged that the two officers had investigated the circumstances under which Sarah Ann Ottens died and had received information through confidential sources that James Wendell Hall was in Room 429 of Rienow Hall where Miss Ottens' body was discovered, a fact which he denied upon being interviewed by the agent; that a fingerprint found in the death room was identified as being the fingerprint of James Wendell Hall.

The officer issuing the warrant also noted on the application the following additional information taken under oath at the time the warrant was issued. Agent John J. Jutte testified his confidential sources were both

male and female student friends and acquaintances of the deceased, one or more of whom had conversed with the deceased on the date of her death. Some of them had been told by the deceased that James Wendell Hall had been in Room 429 of Rienow Hall in the morning of the day of the deceased's death and that he had an appointment to return to the room in the evening; that another source placed James Hall in Room 429 of Rienow Hall on the evening of the victim's death.

Probable cause for the issuance of a search warrant exists when the facts and circumstances presented to the judicial officer are sufficient in themselves to justify the belief of a man of reasonable caution that an offense has been or is being committed. It cannot be based on mere

conclusions, and the officer must make his own determination from the facts presented. State v. Boer, 224 N.W.2d 217, 219 (Iowa 1974).

We have had countless search warrant cases in recent years and the principles upon which an issuance must rest are well established and have been frequently discussed. See State v. Boer, supra, at 219; State v. Lynch, 197 N.W. 2d 186, 191-192 (Iowa 1972), cert. denied 409 U.S. 1116, 93 S.Ct. 916, 34 L.Ed. 2d 700 (1973); State v. Spier, 173 N.W.2d 854, 858 (Iowa 1970). The discussion in these cases need not be repeated here.

The main thrust of defendant's argument is that the confidential information received by the officers was not shown to have been reliable under the tests set out in Aguilar V.

Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed 2d 723, 729 (1964) and adopted by us in State v. Spier, supra, 173 N.W.2d at 858.

However, those cases and others like them deal with paid or otherwise rewarded police undercover agents for whom empirical reliability is required. A distinction is made in the case of the private citizen who gives police confidential information. This matter was discussed in State v. Drake, 224 N.W.2d 476, 478-479 (Iowa 1974) where we said:

"When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money. leniency or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime.

"In the former, the information furnished is less likely to be truthful, and it is therefore subjected to much closer scrutiny

as to the surrounding circumstances reflecting on its credibility. As part of this scrutiny, the informant's prior reliability must ordinarily be demonstrated.

"In the latter, the role of prior reliability is considerably relaxed for several reasons. In the first place, the citizen informer has rarely had any earlier experience in reporting suspected criminal activity. Furthermore, unlike the professional informant, he is without motive to exaggerate, falsify or distort the facts to serve his own ends.

"Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause."

We believe the above discussion is applicable here. The evidence before the issuing officer shows the confidential information came from a number of students who were friends and acquaintances of Sarah Ann Ottens.

Their sole motive was to assist in the investigation of this crime, and we hold the circumstances under which they gave their information is sufficient to attest to their reliability for the purpose of issuing a warrant.

We find at the time the warrant was issued probable cause had been established.

V. Evidentiary Rulings

Defendant claims reversible error because of trial court rulings on the admission and exclusion of evidence in the following respects:

(1) Admissibility of photographs;

(2) Exclusion of testimony as hearsay;

(3) Admission of testimony inconsistent with information set out in bill of particulars;

(4) Failure of the State to produce exculpatory witnesses;

(5) Admission of improper rebuttal testimony; and

(6) Admission of recanting testimony of Mrs. Rosemary Jones.

We consider these in the order listed.

Photographs

Defendant argues certain photographs were duplicative, produced only to enflame the jury, and that it was error to admit them. Involved are five photographs of Sarah Ann Ottens' body.

The admission of photographs is largely within the sound discretion of the trial court and the test of admissibility is relevancy.

State v. Lass, supra, 228 N.W.2d at 771;

State v. Hummel, 228 N.W.2d 77, 83 (Iowa 1975)

State v. Albers, 174 N.W.2d 649, 657 (Iowa 1970)

State v. Dillon, 161 N.W.2d 738, 741 (Iowa 1968). The trial Court was careful to avoid duplication in the admission of photographs. The exhibits objected to here were received after the court had made a determination that each portrayed some different or additional circumstance not present in other pictures.

It is quite true some of the photographic evidence was gruesome but that is because they depicted a gruesome scene. They were relevant in showing the nature and extent of the attack upon the victim and the condition of her body when found. If relevant for no other purpose, they certainly had a bearing on the issues of malice and premeditation We find no abuse of discretion in the admission of the challenged photographs. See State v. Dillon, supra, 161 N.W. 2d at 741.

Hearsay

Defendant complains because the trial court sustained several hearsay objections to evidence which he says was exculpatory in nature. He asserts such rulings on this "crucial" testimony constituted reversible error.

In one case, an investigating officer was not permitted to testify he had been told by other officers blood had been found in the basement of Rienow Hall. He had no independent knowledge of this alleged fact. The court's ruling that this was inadmissible hearsay was manifestly correct.

In another instance, another officer attempted to testify to statements made by defendant which would furnish an innocent reason for his presence in Room 429 and explain how his fingerpring might have come to be on the

faucet in the room. Again, there is no serious dispute that this called for hearsay testimony. It is not shown to be within any exception to the rule, and the trial court's ruling was correct.

The last hearsay objection relates to the testimony of Agent Jutte who was asked to testify to things "revealed" to him concerning Miss Ottens' whereabouts on the afternoon of her murder and also asked to testify to several other matters which had been related to him by others. This, too, was properly excluded as hearsay.

We have considered hearsay testimony in a number of recent cases. Each of the challenged rulings was correct under these decisions. See Tonini v. Maloney, 228 N.W.2d 91, 93

(Iowa 1975); State v. Lanphear, 220 N.W.2d 618, 622 (Iowa 1974); State v. Miller, 204 N.W.2d 834, 840-841 (Iowa 1973); State v. Smith, 195 N.W.2d 673, 675-676 (Iowa 1972).

Although defendant now says the purpose of this evidence was not to prove the truth of the assertions but simply to show they were in fact made, no such claim was made at trial. Defendant therefore may not rely on that theory now. See State v. Arnold, 225 N.W.2d 120, 122 (Iowa 1975); State v. Fetters, 202 N.W.2d 84, 93 (Iowa 1972).

Testimony Inconsistent With Bill of Particulars

Defendant asserts error occurred because Dr. Schnetzler was permitted to place the "outside limits of death" between 12:00 noon and 11:00 p.m. on March 13th, although the State

had previously put that period at between 2:00 p.m. and 8:00 p.m. in its bill of particulars.

When a bill of particulars is furnished, the State is thereafter limited to proof of the acts indicated in such specifications. State v. White, 260 Iowa 1000, 1005, 151 N.W.2d 552, 555 (1967); State v. Schuling, 216 Iowa 1425, 1428, 250 N.W. 588, 589 (1933). The reason for this rule is to assure defendant against surprise and to give him necessary information before trial as to the matters he must defend against.

At trial, Dr. Schnetzler testified time of death is "difficult to ascertain." He said there are a number of factors which are used to make this determination such as lividity, the temperature of the body, the vitreous humor of the eyes and the degree of rigor mor-

tis.

The doctor then placed the outside limits of death, "based on my experience," at between 12:00 noon and 11:00 p.m. He immediately added the following:

> "I feel this can be somewhat narrowed to between the hours of 3:00 p.m. and 9:00 p.m. and in all likelihood the death occurred between these hours. No tests as to time of death are infallible."

Defendant insists this answer substantially, and prejudicially, expanded the time within which death may have occurred. However, if the whole answer is considered instead of only the first part, it is apparent the time difference between the bill of particulars (2:00 p.m. to 8:00 p.m.) and the doctor's testimony (3:00 p.m. to 9:00 p.m.) is unimportant under the record in this case. Perhaps Dr. Schnetzler was ultraconservative in his

testimony, but it cannot be disputed he was of the opinion death occurred between 3:00 p.m. and 9:00 p.m.

In many cases the precise time of death is a vital circumstance; but not here. No effort was made to account for defendant's whereabouts during either period. The minor time difference between the bill of particulars and the testimony did not prejudice defendant. Not every insignificant variation entitles defendant to exclusion of evidence which is not identical with facts detailed in a bill of particulars.

Defendant has shown no right to relief on this ground.

Failure to Call Witnesses Who Testified Before the Grand Jury

Defendant objects because the State failed to call as witnesses at trial several persons who testified before the grand jury. He limits his argument here to one witness, Robert Dean Jones. We restrict our discussion accordingly.

Defendant says Robert Dean Jones possessed exculpatory information and that the State was obligated to produce him as a witness. His motion to that effect was rejected. Later defendant called Jones as his witness. We discuss his testimony in detail later.

Two principles are involved. First, the State may not suppress exculpatory information. To do so is reversible error. State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974). Secondly, the State need not call every witness who testifies before the grand jury.

State v. Hinsey, 200 N.W.2d 810, 817 (Iowa 1972); State v. Christ, 189 Iowa 474, 483, 177 N.W. 54, 58 (1920).

Defendant does not claim the State suppressed the exculpatory evidence. Indeed he was at all times aware of the information Jones had and, as heretofore noted, used Jones as his own witness. His complaint is that the State did not call this man as a prosecution witness; but the State was under no compulsion to do so. There is no merit in defendant's argument to the contrary.

Rebuttal Testimony of John Reding

This matter is closely related to the previous discussion of the State's refusal to call Robert Dean Jones as a witness.

The controversy concerning the testimony of Robert Dean Jones and the so-called rebuttal testimony of John Reding became one of the most bitterly contested issues of the whole trial. We are unable to attach the same importance to it as did either the State or the defense. The matter arose in this way.

Robert Dean Jones, a student at the University and a resident in Rienow Hall, testified he was in the first floor corridor of that building talking with Elsie Barnes, the desk clerk at Rienow Hall, shortly after 3:00 p.m. on the day in question. He was waiting for the elevator, as he wanted to return to his room on the fifth floor to get a coat he had forgotten. When the elevator stopped on the

first floor, Sarah Ann Ottens was there with an unidentified white male. (Defendant is black.) These two and Jones were the only persons on the car. As the trhee rode up, Miss Ottens and her companion engaged in some conversation although Jones does not recall the nature of it. They appeared to be friends, or at least acquainted, and they got off on the fourth floor together. Jones then went on up to the fifth floor.

Elsie Barnes verifies this version except that she places the time about 4:00 p.m. and she was unable to see the second person on the elevator when it stopped at the first floor. She saw Miss Ottens and she was the arm of a second person reach out to the button panel on the elevator.

This is the sum total of Jones' testimony. Its value, or course, is to place Miss Ottens in the company of a male companion other than defendant at a critical time during the day of her death.

The State then called John Reding as a rebuttal witness. Reding was a repairman who was working on the Rienow Hall elevators on the fatal day. He testified he rode the elevators up and down a number of times during the day as he was recabling the cars. He remembered specifically one occasion which he placed at approximately 2:00 p.m., although admitting it could have been a little later, when he rode with an unidentified girl and her unidentified male companion. He knew neither of them and could not give a description of them because he had broken his glasses and had

very poor vision without them.

He gave some description of the clothing the girl was wearing, which was consistent with the type of clothing Miss Ottens had on. Reding remembered the girl was carrying something and he thought it strange that her companion did not take this burden from her. Reding thought this couple was acquainted. He said they got off the elevator together but does not remember where. That was the substance of his testimony.

Although the State insists that Reding's testimony was rebuttal because it "explained" the testimony of Robert Dean Jones, we find nothing in it of a rebuttal nature. Neither do we find anything of any importance, and we think it was entirely inconsequential to any

issue in the case.

Apparently the State's theory in offering this testimony was that the person Jones saw on the elevator with Miss Ottens was Reding, but the evidence conclusively refutes that conclusion.

Not only are there material differences in time sequence (Reding places his ride near 2:00 p.m. and the testimony of Jones and Elsie Barnes places their observation at anywhere from 3:00 to 4:00 p.m.), there is the additional circumstance that the young lady Reding saw was carrying a package sufficiently large he thought he thought her companion should have helped her with it. Yet neither Jones nor Elsie Barnes remembered seeing Miss Ottens carrying anything when they observed her.

Besides the inconsistencies already noted, we point out additionally that Jones said Miss Ottens and her companion left the car together at the fourth floor. This could not have been Reding, who testified the couple he saw left the elevator together while he stayed on.

Under the evidence, Reding could not have been the man Jones saw with Miss Ottens. The two witnesses, Jones and Reding, were simply describing different events. Jones saw Miss Ottens and a man who could not have been Reding leave the elevator together. Reding saw an unidentified girl and an unidentified man leave the elevator together approximately an hour earlier.

There is nothing unusual about this kind

of elevator traffic in a college dormitory building. Reding's testimony does not rebut or explain Jones' in a single detail. It was not proper rebuttal evidence.

While we think that the trial court should have rejected Reding's testimony as not being rebuttal, the decision permitting him to testify was without prejudice.

We believe the sum total of the testimony of Jones and Reding is this: Jones rode up on the elevator with Miss Ottens and an unidentified white male between 3:00 p.m. and 4:00 p.m. They got off on the fourth floor.

Reding rode up on the elevator with an unidentified girl and an unidentified male about 2:00 p.m. He does not know who they are, he cannot describe them. In that case, too, the

male was not a black although he was dark skinned and may have been of Mexican extraction.

There was no reversible error here.

Testimony of Rosemary Jones

One of the strangest developments in this case centers around the witness Rosemary Jones, who was employed as a cleaning lady in Rienow Hall. She had testified before the grand jury and again at trial as a defense witness that she had seen a black male knocking on the door of Room 429 in Rienow Hall about 3:00 p.m. on the day of Miss Ottens' death. She said this person was not the defendant.

The day following her testimony, the prosecutor announced to the trial judge that Rosemary Jones wanted to correct her testimony

because she had lied while testifying the day before. He asked permission to recall her for further cross-examination as the following proceedings out of the presence of the jury show:

> "THE COURT: (to Mr. Woodward) I take it you are moving to reopen the cross-examination of the witness Rosemary Jones?
>
> "MR. WOODWARD: That is correct, Your Honor.
>
> "THE COURT: For the purpose of the record for what reason?
>
> "MR. WOODWARD: For the purpose, Your Honor, that the witness Rosemary Jones has indicated that she lied on the witness stand when she was here Tuesday, and that she did know -- that when she was on the witness stand she said that a person she saw at the door was not the defendant, but in actuality she did know that it was the defendant.
>
> "THE COURT: (To Mr. Tucker) And you resist this?

"MR. TUCKER: This is not further cross-examination, Your Honor. Opportunity for examination was given, was completed, and this is as to a matter which came up subsequent to the time of her testimony, and in no way can be construed as further cross-examination, and it appears to me that recall, which I feel is erroneous to even be permitted, would have to be as their witness, because we are not talking about matters they are putting into evidence for purposes of substantive proof
* * *

"THE COURT: Mr. Tucker, are you saying that the Court doesn't have authority to allow a party to reopen any matter on the trial even on direct examination or defense evidence in view of newly --

"MR. TUCKER: I am saying that the matter which is now being presented to the Court for trial purposes constitutes substantive evidence, not for purposes of impeachment, and as substantive evidence this is exactly like the question of an objection, 'Well, you want to make the witness your witness for purposes of this, you have the right to do so.' But not as a part of cross-examination, and I am stating that the Court does not have authority

to declare this to be a recall for further cross-examination, that they are calling her for their purpose, for the purpose of introducing substantive evidence in this case.

"THE COURT: The Court will allow the State to recall this witness for further cross-examination."

Granting permission to recall a witness for further examination, either direct or cross, lies largely within the discretion of the trial court. We hold the ruling here was not an abuse of that discretion. State v. Droste, 232 N.W 2d 483, 488 (Iowa 1975); Potter v. State, 257 Ind. 370, 274 N.E.2d 699, 701 (1972); State v McAdams, 83 N.M. 544, 494 P.2d 622, 624 (1972); Commonwealth v. Crosby, 450 Pa. 68, 297 A.2d 114, 116 (1972); Harvey v. State, 485 P.2d 251, 254 (Okla. 1971);

State v. Summa, 5 Conn. Cir. 78, 242 A.2d 94,

96 (1968); 98 C.J.S. Witnesses Section 365 (1957).

Bearing on this question, too, is the rule that the scope of cross-examination lies within the sound discretion of the trial court. State v. Everett, 214 N.W. 2d 214, 219 (Iowa 1974); State v. Hinsey, 200 N.W. 2d 810, 816 (Iowa 1972); State v. Harrington, 178 N.W. 2d 314, 314 (Iowa 1970).

The trial was still in progress, the evidence had not been closed, and refusal to permit a witness who volunteered she had prejured herself the opportunity to correct her false testimony under such circumstances would seem to be a grave injustice. Defendant cites State v. Compiano, 261 Iowa 509, 154 N.W. 2d 845 (1967) as contrary authority.

However, that case presents an entirely different factual situation. In Compiano the trial had been completed, the jury had returned a verdict of guilty, and thereafter defendant filed a motion for a new trial on the ground of newly discovered evidence. His newly discovered evidence was that one of the witnesses had recanted his testimony. We refused to grant a new trial, taking into account the whole record, the nature of the testimony to be recanted and the fact that it was not properly newly discovered evidence. We concluded the defendant had been afforded a fair trial and was not entitled to another. Id. at 851-852.

We reject defendant's claim the court

erred in permitting the State to recall Rosemary Jones for further cross-examination.

VI. Instructions

Defendant also raises objection concerning instructions, both those given and those refused.

His first assignment is directed toward Instruction No. 14, which discussed the essential elements of first degree murder and then stated that an inference of premeditation was permissible where an opportunity to deliberate was shown. The instruction then added:

> " This inference is not conclusive, but may be considered by you with all of the evidence in the case, or lack of evidence * * *"

Defendant claims this is reversible error

because it incorrectly shifts the burden of rebutting the inference of premeditation from the State to defendant. He relies on State v. McGranahan, 206 N.W.2d 88, 92 (Iowa 1973) and State v. Boyken, 217 N.W.2d 218, 219 (Iowa 1974). See also State v. Hansen, 225 N.W.2d 343, 346-347 (Iowa 1975).

In these cases, we held it reversible error to instruct on reasonable doubt without limiting the reference to lack of evidence to the State's case. We said it was reversible error to leave the impression the jury might consider defendant's failure to produce evidence in considering reasonable doubt because such a conclusion would place an unconstitutional burden upon him.

We have recently considered the argument

now made by defendant. In State v. Lass, 228 N.W. 2d 758, 766-767 (Iowa 1975), we said:

> "Defendant contends that the court should have used the words lack or absence of evidence 'by the State', but we do not believe the jury could have understood the defendant had any burden of proof. In the reasonable doubt instruction this very point was made clear and the other instructions on the elements of criminal homicide expressly placed the burden on the State on every element. The court did not use the language held noxious in State v. Hansen, 203 N.W.2d 216, 218."

We believe that same reasoning applies here. The court was careful to place the burden of proof on the State in the reasonable doubt instruction. It did the same when instructing on the elements of the crime. There is no possibility the jury could have been confused concerning burden of proof.

Defendant also challenges the instruction on venue. He says the trial court erred by

refusing to give his requested instruction explaining that issue in specific evidentiary terms. The court gave the following instruction on venue:

> "The law provides that all crimes must be prosecuted in the county where the crime was committed. The burden is upon the State to establish beyond a reasonable doubt that any crime charged in this case was committed in Johnson County, Iowa."

In another instruction the jury was told:

> " The State must establish by the evidence beyond a reasonable doubt each of the following propositions: (1) that on or about March 13, 1973, in the County of Johnson and State of Iowa, the defendant did unlawfully inflict injuries upon the body of Sarah Ann Ottens."

We find no merit in this argument. During trial, defendant conceded the venue instruction as given was a proper statement of the law. He contends, however, it should have

been more specific because of the peculiar circumstances of this case. The matters now urged by defendant were adequately covered in other instructions.

Defendant's complaint is without merit.

Defendant also argues reversible error in the court's refusal to give three requested instructions.

The first dealt with specific testimony of Andrew Newquist with relation to the fingerpring; the second referred to specific evidence in connection with the hairs found on defendant's shoe and the victim's blouse; and the last asked that an instruction be given to the effect defendant's presence at the scene of the crime is not alone sufficient to warrant a conviction.

The first two of these requested instructions, if given, would have constituted judicial comment of doubtful propriety on the evidence. State v. Milliken, 204 N.W.2d 594, 596 (Iowa 1973); State v. Gillespie, 163 N.W. 2d 922, 927 (Iowa 1969). The last was adequately covered by the general instructions as to what the State must prove in order to convict defendant.

There was no error in the trial court's refusal to instruct according to these requests.

Defendant's final complaint about the instructions is the court's refusal to instruct on impeachment. The court gave the usual credibility instruction. Defendant did not request an impeachment instruction but now

argues the trial court should have so instructed on its own motion.

Defendant fails to pinpoint the impeachment evidence which was so important the court should have given, sua sponte, such an instruction. Without deciding if an impeachment instruction should have been given if requested, we hold it was not error to omit such an instruction in the absence of a request.

The trial court must instruct on all issues important in the jury's consideration of the case whether requested to do so or not. State v. Ritchison, 223 N.W.2d 207, 211 (Iowa 1974); Elkader Coop. Co. v. Matt, 204 N.W. 2d 873, 876, 877 (Iowa 1973). We hold instructions given in the present case meet that test.

VII. Prosecutorial Misconduct

One of the grounds relied on by defendant for a reversal of the conviction is alleged prosecutorial misconduct. He stated this occurred in three separate areas-opening statement, presentation of evidence, and final argument. We consider the alleged errors in that order. Other prosecutorial misconduct is alleged with reference to grand jury proceedings. This has been considered separately under Grand Jury Proceedings.

It is not the prosecutor's misconduct which entitles a defendant to relief; it is the prejudice resulting from that misconduct which does so. Ordinarily there must be a showing of prejudice before the prosecutor's actions will result in a reversal. State v.

Lass, 228 N.W.2d 758, 769-770 (Iowa 1975); State v. Blyth, 226 N.W.2d 250, 272 (Iowa 1975); State v. Hansen, 225 N.W.2d 343, 349 (Iowa 1975); State v. Williams, 217 N.W. 2d 573, 575 (Iowa 1974); State v. Ampey, 210 N.W.2d 433, 435-436 (Iowa 1973).

Prosecutorial Misconduct - Opening Statement

In several respects defendant's complaints about the opening statement are without factual foundation. He says that the Assistant Attorney General misstated what he could prove when he mentioned another blow upon the decedent's body which came after her death "to an organ, I believe the kidney, as I recall it." There was testimony of such a blow from Dr. Schnetzler. He stated that

there was an injury either to the kidney or the liver which resulted from a sharp blow on the abdomen, probably inflicted after death.

Defendant also objected because the prosecutor mentioned the presence of fecal matter on decedent's face when her body was discovered. There was evidence to substantiate this statement in the autopsy report received in evidence.

In the opening statement mention was made that a hair taken from defendant's tennis shoe would be shown "beyond a reasonable doubt" to have come from Sarah Ottens. Objection was made to this statement, and the jury was admonished to disregard the prosecutor's remarks as to proof.

Defendant argues the State designedly

made the claim it could prove the source of this hair beyond a reasonable doubt when it knew the evidence at best could only show it could have been hers-that it was "consistent" with her hair type. While the prosecutor overstated himself, there is no indication this was done in bad faith, the matter was promptly stopped, and an appropriate instruction given that it should be disregarded. No. prejudice resulted from this statement.

We reach the same conclusion concerning the objection that the prosecutor stated there was no eyewitness identification. No objection was made to this statement. Without extended discussion, we hold the context in which this was said leaves some doubt

as to whether it was factually inaccurate; and in any event, it was not prejudicial, even if wrong.

The final objection to the opening statement concerns the prosecutor's reference to an interview conducted by John Jutte, an investigator for the Bureau of Criminal Investigation. This was referred to briefly. Defense counsel objected to the statement. No ruling on the objection was made but the court directed counsel to discontinue that course, which he did. The complaint urged is that this reference was in disregard of the court's ruling on defendant's motion in limine. This is not correct. The motion in limine was overruled with regard to any statements made by defendant to Mr. Jutte.

All of the above matters were considered by the trial court in ruling on defendant's motion for new trial. As to those few instances in which there was some misstatement of fact, whether inadvertent or intentional, the matter was so minor and immaterial that no prejudice resulted and the trial court properly ruled in that manner.

Prosecutorial Misconduct - Presentation of Evidence

The objection to this part of the prosecutor's conduct takes three courses, all of which involve the use of exhibits.

A broom found in the victim's room had been identified as the possible murder weapon. It was admitted into evidence. Defendant objects because he says this exhibit

was allowed to stand for some time in full view of the jury after Dr. Schnetzler's testimony. We find no reviewable issue here. The record does not disclose the factual situation defendant relies on nor does it show any objection made at the time the a-leged error occurred. Error, if there was any, was waived. See State v. Rutledge, 243 Iowa 179, 198, 47 N.W.2d 251, 263 (1951).

The State had prepared a sketch of a man supposed to have been in Rienow Hall during the afternoon in question. During the testimony of Mr. Reding, the prosecutor exhibited this sketch (which had previously been admitted into evidence) to the witness for purposes the record does not disclose.

The court immediately stopped this attempt, and there the matter ended. No prejudice resulted therefrom.

The third complaint involves a tennis shoe allegedly belonging to defendant. The prosecutor attempted to show that an injury to Miss Ottens' head could have been inflicted by a kick from a person wearing such a shoe. The shoe itself had been admitted into evidence. During Dr. Schnetzler's testimony, the prosecutor had him examine the shoe and then attempted to elicit from him the opinion that the head injury could have resulted in the manner suggested.

Objection to this testimony was sustained. The prosecutor persisted with several additional questions concerning this matter. Objections

were consistently sustained. Defendant assails the prosecutor's conduct as being a deliberate attempt to violate the trial court's rulings. Apparently the trial court did not so regard it, and neither do we.

The basis for the exclusion of this evidence was that it was too speculative. We are unwilling to say counsel may not try, within proper limits, to cure that objection, if he can do so. As we view the record, this is what he tried to do. Even though unsuccessful, he did not exceed the bounds of proper inquiry into his possibility of doing so. The circumstances here, despite defendant's claims to the contrary, do not run afoul of the rules outlined in State v. Levy, supra, 160 N.W.2d at 464-468 or

State v. Haffa, 246 Iowa 1275, 71 N.W.2d 35, 42 (1955), cert. denied 350 U.S. 914, 76 S. Ct. 198, 100 L. Ed. 801.

Prosecutorial Misconduct - Closing Argument

The objection to counsel's statements in closing argument involves two specific areas.

First, counsel attempted to argue to the jury that they should view their task with one eye on what happens if they did not "do their duty to protect society." Objection was made and sustained. This argument was thereupon abandoned. The jury was instructed to disregard such comments.

Without attempting to say whether the argument itself was improper, we believe error was averted by the prompt ruling of

the court and the cautionary instruction to the jury.

The second matter involves a more serious question. In closing argument, the prosecutor made the following statement:

> "You do not have to accept the version that he (defendant's counsel) gave as to why the defendant didn't take the stand; you don't have to accept that. You can use any reason that you feel, and I feel I can comment since he pointed out that he didn't take it because the evidence was weak. That is their version."

Defendant made no objection to this argument until his motion for new trial and ordinarily would hold he had waived any right to raise the issue by failing to register timely complaint. State v. Nelson, filed October 15, 1975; Andrews v. Struble, 178 N.W.2d 391, 401-402 (Iowa 1970). However, we nevertheless consider it because this

statement alone, if indefensibly made, would be grounds for reversal. Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, 109 (1965); State v. Phillips, 226 N.W.2d 16, 18 (Iowa 1975); State v. Osborn, 258 Iowa 390, 391, 139 N.W.2d 177, 178 (1965).

The State claims this comment, admittedly prejudicially erroneous under ordinary circumstances, was made in response to the defendant's closing argument. The State relies on the

State v. White, supra, 225 N.W.2d at 106; State v. O'Kelly. 211 N.W.2d 589, 597 (Iowa 1973); State v. McPherson, 171 N.W.2d 870, 874 (Iowa 1969); State v. Sage, supra, 162 N.W.2d at 503; State v. Arredondo, 111

Ariz. 141, 526 P.2d 163, 166 (1974); State v. Bickham, 239 La. 1094, 121 So.2d 207, 214 (1960), cert. denied 364 U.S. 874, 81 S. Ct. 123, 5 L.Ed. 2d 98 (1960); Commonwealth v. Darnell, 179 Pa. Super. 461, 116 A.2d 310, 312 (1955).

In the present case, defense counsel, in closing argument, made this statement:

> "You will be specifically instructed that you are not entitled to basically use anything by way of conjecture, speculation or suspicion. * * * You could have feelings in this case insofar as the guilt or innocence of the defendant; this is not sufficient. The defendant in this case is entitled to and you have got to recognize that the presumption of innocence does exist, and it must exist in order for our law and in order for our courts to operate, and that if this does not exist then basically the society structure upon which this entire area is based would fall, and you are going to be instructed that he is entitled to his. You are also going to be instructed upon

> the fact that the defendant has chosen not to take the witness stand in this case and that this is also a right which is guaranteed to him, and that the presumption of innocence still exists and you cannot use this against him. The evidence in this case was not sufficient upon which anything rested which required basically answers to any matters which had been raised." (Emphasis supplied.)

Although carefully and ingenuously worded, this statement was clearly designed to persuade the jury defendant did not testify because the case against him was so weak it was unnecessary for him to do so. The impression counsel wanted to leave with the jury was that, had there been any evidence which required explanation, defendant would have taken the stand.

The State was entitled to point out there may have been reasons other than the one mentioned for defendant's failure to testify. This was done in a restrained and temperate manner.

If defendant wants the benefit of hiw own explanation for failing to testify, he must risk the danger inherent in the State's right to answer that argument. The State need not sit mut and let such a self-serving statement go unchallenged. We believe the matter comes clearly within the doctrine of invited error, and that defendant may not now rely upon it for reversal.

In considering this matter, we note defense counsel made no objection to this argument at trial. Apparently he thought it was proper response at the time.

We find no reversible error in the matters raised concerning prosecutorial misconduct.

VII. Jury Misconduct

Defendant asserts he is entitled to a new trial because of jury misconduct. His claim is based upon three separate incidents: (1) Juror Housel's admission he doubted his ability to act impartially; (2) several jurors drove past Rienow Hall during the trial; and (3) some of the jurors had an alcoholic drink at dinner on the night the case was under jury consideration.

As to the prejudicial knowledge possessed by Juror Housel, we agree with the trial court that this matter was sufficiently dealt with by promptly excusing the juror from further duty. Apparently this man had information which, if communicated to the other jurors, would have been prejudicial. Housel said he

did not discuss this matter with the other jurors and did not communicate his information to them. There is nothing to indicate anything to the contrary.

When the matter first came to the attention of the trial court during the course of the trial, the court promptly conducted a hearing to ascertain if such information had been passed on to other jurors. There was not a scintilla of evidence that it had. At the conclusion of the hearing, the court dismissed Juror Housel and replaced him with an alternate juror. The matter was handled promptly and expeditiously as soon as the trial court learned of Housel's misgivings. There was no prejudice to defendant, and we find no merit in his complaint.

The next charge of improper jury conduct

is based on the fact several jurors rode past Rienow Hall during the trial. It is difficult to see how the mere observation of the exterior of a building such as Rienow Hall could prejudice the jury deliberations. It is only when such conduct results in prejudice that a new trial should be granted. State v. Feddersen. 230 N.W.2d 510, 514 (1975); Osterfoss v. Illinois Central Railroad, 215 N.W.2d 233, 237-238 (Iowa 1974); State v. Houston, 209 N.W.2d 42, 45 (Iowa 1973); State v. Jackson, 195 N.W.2d 687, 690 (Iowa 1972). See also Townsend v. Mid-America Pipeline Co., 168N.W.2d 30, 36 (Iowa 1969); State v. Little, 164 N.W.2d 81, 83 (Iowa 1969). Cf. King v. Barrett, 185 N.W.2d 210, 213 (Iowa 1971).

We believe the trial court properly ruled against defendant on this alleged error.

Defendant next asserts eight of the jurors drank alcoholic beverages at dinner after the case had been delivered to them for determination. The background of this alleged error is as follows: Jury deliberations began at approximately 3:00 p.m.on May 23, 1974. The jurors deliberated until approximately 5:30 p.m., when they went to dinner in a body. They returned to the courthouse at approximately 7:30 p.m. A verdict of guilty was returned at approximately 9:30 p.m. The jurors ate at the University Athletic Club. Each of eight jurors had a cocktail, and apparently the bailiff in whose charge they were

committed had a beer.

In earlier days, the mere fact that intoxicants had been consumed by jurors would have required a new trial without a showing of prejudice. See State v. Reilly, 108 Iowa 735, 737, 78 N.W. 680,681 (1899); Hopkins v. Knapp & Spaulding Company, 92 Iowa 212,214, 60 N.W. 620 (1894); Ryan v. Harrow, 27 Iowa 494, 502 (1869); and State v. Baldy, 17 Iowa 39, 41-43 (1864).

However, later cases demand proof of prejudice before a verdict is set aside because the jurors drank intoxicating liquor. In State v. Phillips, 212 Iowa 1332, 1336-1337, 236 N.W. 104, 106 (1931), it was held the extent and effect of drinking by the jurors are matters of fact for the trial court to decide within its sound discretion

in determining if prejudice is shown. Except for abuse of discretion, we will not interfere with that decision.

In the present case, the trial court gave this matter careful consideration. It denounced the use of intoxicants but found that defendant was not denied a fair trial-the ultimate question. There is no claim any juror was intoxicated. Defendant relies solely on the fact of drinking rather than prejudice resulting therefrom. The trial court observed the jurors as they returned their verdict and remarked that it was apparent from their conduct and demeanor they had solemnly considered the case and that "their decision weighed heavily upon them."

The prevailing view is that drinking

along, without a showing of prejudice, will not suffice to avoid a verdict. 75 Am.Jr. 2d Sections 996; Annot. 7 A.L.R.3d 1040, 1050 (1966). The current trend is to examine the circumstances to determine if prejudice resulted from this jury misconduct. See Laudermilk v. State, Okla. Cr., 494 P.2d 341, 343 (1972); Curtis v. Grifall, 84 Nev. 375, 441 P.2d 680, 681 (Nev. 1968); McDuff v. State, 431 S.W.2d 547, 550 (Tex. Cr. App. 1968); State v. Ovitt, 126 Ver. 320, 229 A.2d 237, 240-241 (1967); Kealoha v. Tanaka, 45 Haw. 454, 370 P. 2d 468, 475-477 (Haw. 1962); Trent v. Commonwealth, 292 Ky. 735, 166 S.W.2d 1002, 1004 (1943). Cf. State v. Houston, 209 N.W.2d 42, 45 (Iowa 1973).

It is indeed unfortunate this incident occurred. It was perhaps more misconduct on the part of the bailiff than on the part of the jurors.

It would be far better if jurors conscientiously avoided the use of intoxicants while serving as jurors. Such conduct can only raise uncertainty in a defendant's mind as to the jury deliberations which resulted in his conviction.

On the other hand, the controlling test is whether defendant was denied a fair trial. If a juror's judgment is affected by alcohol during consideration of a case, the result should not stand. No such showing was made here, nor is any asserted.

We unequivocally condemn drinking of

alcoholic liquor by jurors while a case is under their consideration. It amounts to jury misconduct. However, we cannot say the ingestion of a single cocktail by each of eight jurors before or with their dinner approximately three hours before they reached a verdict had any influence, however remote, on the result.

The trial court reached this conclusion, and we agree with it. If there were any evidence to the contrary, our conclusion would necessarily be otherwise.

We find no reversible error in any of the matters raised by defendant concerning jury misconduct.

IX. Defendant was vigorously and ably defended at trial. That same diligence has marked the presentation of his case on appeal. All matters urged by counsel have been considered, whether separately discussed or not. We find no reversible error, but we find also one unresolved quesiton demands further proceedings.

It concerns defendant's post-trial motion (filed prior to his motion for new trial) asking that the State be ordered to turn over "all transcripts of proceedings before the Johnson County Grand Jury, all statements taken from any persons interviewed by the State of Iowa or any of its law enforcement agencies, whether in writing signed by such person, mechanically recorded or transcripted,

or a statement which could be called the person's own words; and all police reports made or compiled in connection with the investigation and subsequent proceedings in this case for the sole purpose of allowing a review thereof to determine whether or not exculpatory material is present which would mandate a new trial in this case."

This was denied by an order containing the following statement:

> "Defendant's application for production of transcript and statements is overruled. If defendant can specifically state which statemencs and which transcripts in particular he wishes to be examined in camera by the court, and what type of evidence the defendant feels is exculpatory, the court will reconsider the application."

Thereafter defendant's counsel orally explained the purpose of his motion, which

the trial court stated would be considered as a motion to reconsider the above ruling. In considering defendant's application, including the oral explanation, it is apparent he was really seeking the remaining grand jury transcripts which had been previously denied him, abandoning any claim for the other information originally demanded.

We have held a defendant is not entitled to all information in the prosecutor's file and that dragnet requests for information are properly refused. State v. Houston, 209 N.W.2d 42, 46 (Iowa 1973); State v. Cunha, 193 N.W.2d 106,111-112 (Iowa 1972); State v. Eads, supra, 166 N.W.2d at 774. We hold this rule applies whether the application is made before or after trial. Clearly de-

fendant's original demand for the State's entire file was too broad.

However, the same cannot be said of his revised request made in response to the trial court's suggestion that he narrow his sights.

In considering this matter we keep in mind the need for grand jury secrecy is not as critical after trial as it is before. See State v. Sparks, 85 N.M. 429, 512 P.2d 1265, 1267 (1973); cf. People. v. Wimberly, 384 Mich. 67, 179 N.W. 2d 623, 626 (1970) and Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965, 967-968 (1971). See also ABA Standards, Discovery and Procedure Before Trial, Section 2.1(a)(iii) and commentary (1969). Although we have never squarely decided the question now posed, we touched on

it in State v. Niccum, supra, 190 N.W. 2d at 827-828.

We believe defendant should have been allowed an opportunity to ascertain if the grand jury transcripts disclosed suppression of exculpatory evidence.

If such evidence has been suppressed, defendant is entitled to a new trial. State v. Houston, supra, 209 N.W.2d at 47; State v. Peterson, supra, 219 N.W.2d at 674; cf. Johnson v.Superior Court, supra, 132 Cal. Rptr. 36, 539 P.2d 796 (1975); People v. Duncan, 201 N.W.2d 629(Mich. 1972). However, until this reversible error is demonstrated, defendant is not entitled to relief. Therefore we need not now grant a new trial; we need only adopt procedures

which permit a determination of the critical question-was exculpatory evidence suppressed.

In other contexts we have ordered a limited remand for determination of related questions before deciding if further remedies were in order. State v. Fryer, 226 N.W. 2d 36, 39 (Iowa 1975); State v. Mayhew, 170 N.W.2d 608, 614 (Iowa 1969); State v. White, 260 Iowa 1000, 1004, 1010, 151 N.W.2d 552, 557-558 (1967); cf. State v. Thornburgh, 220 N.W.2d 579, 586-587 (Iowa 1974); State v. Deanda, 218 N.W.2d 649, 651-652 (Iowa 1974).

We are convinced a similar procedure should be followed here. We therefore remand the case to the trial court with directions that an in camera inspection of grand

jury transcripts be made in the presence of counsel for defendant and for the State. State v. Mayhew, supra, 170 N.W.2d at 614; cf. State v. Deanda, supra, 218 N.W.2d at 651.

We are really concerned with only about 275 pages of a total of 1250 pages of grand jury transcript. The remainder was already available to defendant before and during trial.

If such inspection discloses exculpatory evidence was suppressed, a new trial shall be granted. If not, the judgment shall stand affirmed. This is the practice approved in State v. White, supra, 260 Iowa at 1010,

151 N.W.2d at 557.

Of course, defendant's right to appeal from the trial court's in camera determination is preserved.

AFFIRMED ON CONDITION AND
REMANDED WITH INSTRUCTIONS.

All Justices Concur.

IN THE DISTRICT COURT OF IOWA IN AND
FOR JOHNSON COUNTY

	)Dated:February 27, 1976
STATE OF IOWA	) No. 6115
	)
vs.	)RULING ON MOTION
	)FOR NEW TRIAL AND
	)MOTION TO PRODUCE
JAMES WENDELL HALL,	)EVIDENCE
Defendant.	)

This action was remanded by the Supreme Court to allow defendant an opportunity to ascertain whether the Grand Jury transcripts previously not seen by defendant, disclose suppression of exculpatory evidence. This Court is to grant a new trial if exculpatory evidence was suppressed.

An in camera type hearing was not necessary. The prosecution turned over the balance of the Grand Jury transcripts, transcripts from the second quarter Grand

Jury, and transcripts of five witnesses called before the County Attorney. They assented to a procedure which allowed defense counsel to examine this material in its entirety, and from the same, motions for new trial and other motions have been filed.

At the time of trial the Grand Jury transcripts of witnesses called by the prosecution, along with transcripts of three other people called before the Grand Jury but not as witnesses, were given to the Court. These transcripts were provided defendant's counsel prior to cross examination, with limited exception. The pages not given defendant were filed with the Clerk of Court, but were misplaced.

However, they now have been provided defendant's counsel in their entirety.

One of the exceptions was the testimony of Jutte contained in pages 623 to 630. Jutte appeared before the Grand Jury several times, and apparently the prosecution failed, inadvertently, to turn over this testimony to either the Court or defense counsel at time of trial.

MOTION FOR NEW TRIAL

PARAGRAPHS 1, 2, 3, 4

TESTIMONY OF ELIZABETH ALLEN AND JOHN JUTTE

Defendant claims that in paragraphs 1, 2, 3 and 4 of his motion that the testimony of Elizabeth Allen and John

Jutte contained exculpatory matters. This was in regard to the number of phone calls received by Ernie Roberson and the time that it took him after receiving a phone call until he met the defendant Hall inside Rienow . It is defendant's claim that he could have impeached the testimony of Roberson and met the arguments of the prosecutor speculating that Hall was inside Rienow Hall at the time the phone call was made.

Roberson (beginning on page 262 of the transcript of trial) maintains he received two calls from Jim Hall, the first at 10 o'clock and the other about 10:30. He stated that on the first call Hall had asked him if he would let him in the dorm,

which was locked, and that he would call back when he wanted to get in. The second call he stated he wanted to be let in the dorm, which Roberson agreed to do. On page 264, when asked how much time had elapsed between the time that he hung up and the next time he met Mr. Hall, somewhere around the fourth and fifth floor, his answer was, "About three or four minutes." Later, on direct examination, page 266, he indicated that Hall would not have had time to have come from Slater Hall to Rienow Hall from the time he hung up the telephone. On cross examination, page 275, defense counsel called to his attention that he had corrected a page before he started down to

see Jim, and called to his attention that Betsy Allen had indicated this. On re-direct examination he stated that he was surprised in meeting Hall so soon and that he didn't expect to meet him so soon. (Page 280)

Elizabeth Allen, before the Grand Jury, on pages 606 and 895, stated that Roberson received only one phone call, but on page 607 said she could have been wrong. Whether he received one or two is of relatively little importance. Further, on the Grand Jury testimony of Roberson, which was available, the defense counsel on page 879, when asked about the contradiction of the one or two phone calls, said the call may have been before

she arrived.

Elizabeth Allen, pages 607, 608, 611 and 612, made references as to the time from the phone call until Roberson left the room in arriving at the conclusion that it was two and a fourth to two and a half minutes, that he apparently was confused about the need of a key that Roberson was looking for, and her testimony was somewhat conflicting. However, at the time of cross examination of Roberson defense counsel had Roberson's Grand Jury testimony on page 880. Allen's testimony was called to his attention and any differences in their stories were available to defense counsel. Perhaps more important, defense counsel

had the minutes of evidence of Elizabeth Allen stating she remembered one phone call, that he directed her as to how to type a page, left immediately, and was out of the room 15 to 20 minutes. Defense counsel also interviewed Miss Allen immediately before trial. Defense counsel at time of trial presented testimony as to the time it would take to go from defendant's room to Rienow Hall.

The Court finds as a fact that there was nothing exculpatory suppressed in the testimony of either Elizabeth Allen or John Jutte that prejudiced the defendant in this trial.

The prosecutor has a duty not to suppress important evidence. Exclusion

of evidence is not prejudicial error where the same facts are shown by other evidence. State vs. McLain, 125 NW 2d 764, pages 769 and 770. The inconsistencies between the testimony of Roberson and Elizabeth Allen were known to defendant before cross examination. They were contained in Roberson's own Grand Jury testimony. Defendant's attorney interviewed Miss Allen and had copies of her minutes of testimony. Jutte's evidence involving time was known to defendant by the testimony of his witness Cilek. Defendants have a duty to exercise due diligence. See United States vs. Fabric Garment Co., 262 Fed. 2d 631, and United States vs.

Soblen, 301 Fed. 2d 636.

PARAGRAPHS 5, 6, 7, and 8
OF DEFENDANT'S MOTION FOR
NEW TRIAL

Defendant complains of Mary Viner remarking that Sarah Ann Ottens had told her an unknown male had stopped in her room the Saturday previous to her death. There is nothing to suggest that this was exculpatory, that it was material to the issues, or that the defendant was in any way prejudiced. The same is true of the Terry Abernathy testimony of a vague resemblance of an individual to a sketch, and Paul Mott's testimony as to a sketch resembling an unknown university vending service employee. The same is true of

Jutte's testimony in regard to Rosemary Jones stating that a photograph was similar, but indicating that this wasn't a proper identification. The Court finds that none of these events portray exculpatory evidence that is material, and that the State's failure to disclose same did not prejudice the defendant.

FIRST AMENDMENT TO MOTION FOR NEW TRIAL

DIVISION I

In Division I defendant maintains that the indictment returned against defendant is invalid. This is based on the fact that evidence was taken by the second quarter Johnson County Grand Jury for 1973 and defendant was indicted by the third

quarter Grand Jury. No order of court was entered pursuant to Sections 771.21 and 771.22.

The purpose of the remand was to determine whether there was exculpatory evidence suppressed. This portion of the motion goes beyond this. Said portion of the motion is denied.

In addition, the Court feels there is no merit in defendant's proposition. The matters brought before the second quarter Grand Jury were not for the purpose of obtaining an indictment against the defendant. It was covened to get a hair and fingerprint sample. Defendant was aware of these Grand Jury proceedings

due to his own appearance. No objection was made prior to the entering of a plea and defendant could have raised this matter at any time. The fact that there was no order of court pursuant to Sections 771.21 and 771.22 was a matter of public record, as were the names of the grand jurors. Defendant in no way was deprived of due process of law.

DIVISION II

In Division II defendant raises the matter of John Jutte testifying as to a number of latent fingerprints. Defendant now attempts to show that more fingerprints existed than defendant had knowledge of previous to this time. This has been

hashed and rehashed during preliminary hearings and during the trial. It appears to this Court quite clearly that the latent fingerprints referred to by Jutte contained some that were smudged and not suitable for comparative purposes. This is not new exculpatory evidence first revealed at this time.

Defendant's motion for a new trial is overruled.

MOTIONS TO PRODUCE

Defendant filed motion to produce, amendment to motion to produce, and a second amendment to motion to produce. Said motions to produce are overruled. They go beyond the scope of the remand. In view of the Court's ruling on the motion

for new trial the motions are out of order at this time, and would more properly be filed in the event defendant seeks post conviction relief under Chapter 663A of the Code.

Dated this 27th day of February, 1976.

Judge, 6th Judicial District
of Iowa

Co. Atty.
Wm. Tucker
Garry Woodward
Ass't Atty. Gen.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Appellee) Filed April 12, 1976
v.) ORDER
JAMES WENDELL HALL, Appellant.)

Petitioner Appellant's Petition for Re-Hearing in the above entitled appeal has been considered by the full membership of the Court and is now refused and denied.

Done this 12th day of April 1976.

/s/ C. Edwin Moore
Chief Justice - Iowa Supreme Court

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Appellee) Filed January 19, 1977
v.) 337 59289
JAMES WENDELL HALL, Appellant)

Appeal from Johnson District Court - Lewis W. Schultz, Judge.

Defendant appeals from trial court's ruling on remand, alleging, inter alia, suppression of exculpatory evidence. -- AFFIRMED.

William M. Tucker and Bruce L. Walker, of Iowa City, for appellant.

Richard C. Turner, Attorney General, Garry D. Woodward, Assistant Attorney General, and Jack W. Dooley, County Attorney, for appellee.

Heard en banc.

REYNOLDSON, J.

Defendant was charged under Section 690.1 The Code, 1973, with the unlawful killing of Sarah Ann Ottens. Her body was found in room 429, Reinow Hall, a University of Iowa dormitory. After defendant was convicted and sentenced to imprisonment for 50 years, he appealed.

In our first review, State v. Hall, 235 N.W.2d 702 (Iowa 1975), we held defendant had demonstrated no reversible error, but concluded trial court should have granted his post-trial motion to exmine certain transcripts of grand jury testimony to determine whether the State had suppressed exculpatory evidence. Because those pages of testimony were not before us, we re-

manded for further limited proceedings:

> "We therefore remand the case to the trial court with directions that an in camera inspection of grand jury transcripts be made in the presence of counsel for defendant and for the State. (citations)
>
> "We are really concerned with only about 275 pages of a total 1250 pages of grand jury transcript. The remainder was already available to defendant before and during trial.
>
> "If such inspection discloses exculpatory evidence was suppressed, a new trial shall be granted. If not, the judgment shall stand affirmed. This is the practice approved in State v. White, supra, 260 Iowa at 1010, 151 N.W.2d at 557.
>
> "Of course, defendant's right to appeal from the trial court's in camera determination is preserved."--235 N.W. 2d at 731.

Upon remand, the State turned over to defendant the previously-undisclosed grand jury testimony. The prosecution assented to a procedure which allowed defense counsel to

examine all of the material and avoided an in camera type hearing.

Defendant then filed a motion asserting the grand jury testimony contained exculpatory information necessitating a new trial. This motion was later amended to raise the invalidity of the indictment under which defendant was charge. This asserted invalidity was grounded on a claimed violation of Sections 771.21 and 771.22, The Code, because a third quarter grand jury, without a court order, considered charges against defendant which had already been considered by the second quarter grand jury.

At the same time, defendant filed a motion to produce which, together with amendments

thereto, called for "all information known" to the State relating to numerous persons and incidents revealed in the newly disclosed grand jury testimony, and requested inspection of all latent fingerprints found in the room in which the victim's body was discovered.

In an exhaustive ruling, trial court carefully analyzed the grounds for these motions and overruled them. Defendant now appeals again, pursuant to the right reserved in our first opinion. He asserts 1) the indictment was invalid because it violated Sections 771.21 and 771.22, The Code, 2) exculpatory evidence was suppressed, and 3) trial court erred in overruling his motion to produce. We affirm.

I. Validity of the indictment.

In attacking the indictment, defendant is confronted at the outset with the limited nature of our remand: an in camera inspection of grand jury transcripts to determine if exculpatory evidence was suppressed.

> "It is well settled in Iowa that when the Supreme Court remands for a special purpose, the district court, upon the remand, is limited to do the special thing authorized by this court in its opinion, and nothing else. It has no power or jurisdiction to do anything except to proceed in accordance with the mandate." -- Kuhlmann v. Persinger, 261 Iowa 461, 468, 154 N.W.2d 860, 864 (1967).

See also Hetherington Letter Co. v. O.F. Paulson Const. Co., 192 N.W.2d 808, 809 (Iowa 1971); State v. Mayhew, 183, N.W.2d 723, 725 (Iowa 1971).

Defendant's attempt to enlarge a very constricted area of inquiry by challenging the indictment must fail. Thus we need not consider the merits of his contention. Our treatment of this issue is not to be taken as any indication we perceive merit in defendant's assertions, however. A logical analysis of Sections 771.21 and 771.22, illuminated by State v. Scott, 99 Iowa 36, 68 N.W. 451 (1896), and State v. Collis, 73 Iowa 543, 35 N.W. 625 (1887), does not, in our view, support defendant's attack on the indictment.

II. Suppression of exculpatory evidence.

Trial court, following hearing, held there was no material exculpatory evidence in the formerly-suppressed grand jury testimony.

In appealing from this finding, defendant relies on authorities which indicate he is asserting a violation of due process clause of Amendment 14, United States Constitution, and consequently his right to a fair trial. In our review we therefore examine the totality of the circumstances. State v. Boren, 224 N.W.2d 14, 15 (Iowa 1975), cert. denied, 422 U.S. 1008, 95 S.Ct. 2630, 45 L.Ed2d 671 (1975); State v. Elmore, 201 N.W.2d 443, 445 (Iowa 1972).

We have studied transcripts of the grand jury testimony and the remand hearing mindful of the policy considerations beneath still-developing constitutional disclosure requirements. These constitutional requisites

do not necessarily comport with recommended discovery practices. See A.B.A. Standards Relating to Discovery and Procedure Before Trial, Sections 1.1 through 4.7, at 11-19 (approved draft, 1970).

Although our designation of the type of information which must be disclosed has varied from "exculpatory evidence" (State v. Hall, supra, 235 N.W.2d at 731; State v. Houston, 209 N.W.2d 42, 47 (Iowa 1973) to "matters germane" (State v. Deanda, 218 N.W.2d 649, 652 (Iowa 1974) to "important evidence" (State v. McClain, 256 Iowa 175, 184, 125 N.W.2d 764, 769 (1964) to "materially exculpatory evidence" (State v. Fryer, 226 N.W.2d 36, 40 (Iowa 1975);

State v. Aossey, 201 N.W.2d 731, 734 (Iowa 1972) cert. denied, 412 U.S. 906, 93 S. Ct. 2292, 36 L.Ed.2d 971 (1973), it is clear from both federal and Iowa decisions not all information in the prosecution's files must be turned over as a matter of constitutional due process.

Some of the underlying policy considerations were discussed in State v. Eads, 166 N.W.2d 766, 768-775 (Iowa 1969), and State v. White, 260 Iowa 1000, 1005-1008, 151 N.W.2d 552, 555-556 (1967). To these should be added the concept that the goal of ultimate truth is not served by substituting a parasitic reliance on police reports and statements for vigorous defense investigation.

Thus the rule against defense access to all information in the prosecutor's file and dragnet requests for information has been steadfastly maintained. United States v. Agurs, U.S. , ,96 S.Ct. 2392, 2399, 49 L.Ed2d 342, 353 (1976); State v. Hall, supra, 235 N.W.2d at 731; see Annot., 34 A.L.R. 3d 16 (1970).

To constitute a due process violation under Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215, 218 (1963) the suppressed information must be material either to the guilt or punishment of the defendant, not merely potentially or inferentially helpful to the defense. Confronted with a defense argument that the Brady rule should be expanded to include

material which might conceivably aid the defense in preparation of its case, the federal circuit court in Williams v. Wolff, 473 F.2d 1049, 1054 (8 Cir. 1973), observed,

> "There is little in the prosecutor's file which might not 'aid' in some remote or fanciful way the defense of a case. Unless we are prepared to hold that the prosecutor's file shall be opened to the defense upon demand, which may, indeed, be in the wind, we are not prepared to bring the suggested expansion within the constitutional duty."

The eighth circuit's speculation a Brady rule expansion might be "in the wind" was laid to rest in Agurs, supra, U.S. at , 96 S.Ct. at 2400, 49 L.Ed.2d at 353, where the United States Supreme Court said,

> "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a

matter of routine practice.

"Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. While expressing the opinion that representatives of the State may not 'suppress substantial material evidence', former Chief Justice Traynor of the California Supreme Court has pointed out that 'they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses.' In re Imbler, 35 Cal. Rptr. 293, 387 P2d 6, 14 (1963). And this Court recently noted that there is 'no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on the case.' Moore v. Illinois, 408 U.S. 786, 795, 33 L.Ed.2d 706, 92 S.Ct. 2562. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (Emphasis supplied).

The same concept was thus articulated in Giglio v. United States, 405 U.S. 150, 154

92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108 (1972):

> "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict * * *.' United States v. Keogh, 391 F.2d 138, 148 (C.A. 2 1968)."

Our decisions have not attempted to define "materiality" in the context of delineating what information the State must divulge. However, some specific ancillary rules have evolved in our opinions. Information will not be deemed material if other State witnesses acknowledge the matters. State v. Aossey, supra, 201 N.W.2d at 734. Information may be material and exculpatory even though inadmissible as evidence and con-

tradicted by other information. State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974). Failure to furnish evidence of a fact otherwise well established and nowhere controverted does not become "material" in the context of a due process violation. See State v. McClain, supra, 256 Iowa at 186, 125 N.W.2d at 770.

While the concept of constitutional "materiality" was explored in federal decisions, including Brady, supra; Napue v. Illinois, 360 U.S. 264, 271, 79 S. Ct. 1173, 1178, 3 L.Ed.2d 1217, 1222 (1959); and United States v. Keogh, supra, even a limited effort to stake out its varying dimensions was not attempted by the United States Supreme Court until Agurs, supra.

The Agurs court identified three situations involving the discovery, after trial, of information which had been known to the prosecution but unknown to the defense. The court noted in each situation the measure of Brady "materiality" was defined in different language.

The first situation defined by the court (typified by Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) presented a case where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have know, or the perjury." Thus prosecutorial misconduct and corruption of the truth-seeking function of the trial process necessitate a strict

standard. The conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, supra, U.S. at , 96 S.Ct. at 2397, 49 L.Ed.2d at 349-350.

The second situation is characterized by a pretrial request for specific information. The Agurs court observed this was the case in Brady, noting,

> "A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."
> -- U.S. at ,96 S.Ct. at 2398, 49 L.Ed 2d at 350.

Obviously, there is little basic difference between this test of materiality and that set out in the preceding paragraph.

The third situtation arises when there has been only a general request for "Brady material." The Agurs court equated such a dragnet request with no request at all. It placed to one side those cases in which the information is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty toproduce, in which case nondisclosure would violate defendant's constitutional right to fair trial. In the cases remaining, Agurs held the trial judge "should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless error standard." Rather, only where "the omitted evidence creates a reasonable doubt that did not otherwise exist" has a constitutional violation occurred. Id., U.S. at

96 S.Ct. at 2401, 49 L.Ed.2d at 354-355.

The case before us falls in the second fact pattern, above, because defendant also made a pre-trial request for the grand jury transcripts. We have therefore examined these transcripts and the remand hearing record to determine if the information, undisclosed despite request, "might have affected the outcome of the trial."

Certain grand jury testimony of Elizabeth Allen, who was in Roberson's room just before his meeting with defendant on the stairway, disclosed she remembered only one telephone call (rather than two as shown by State's evidence) and that Roberson may have spent more time in the room before leaving to let defendant in the building. Most of this

information was available to defendant through minutes of evidence attached to the indictment and through Roberson's disclosed grand jury testimony. Defense counsel interviewed Allen before trial. It is clear the gist of her testimony was available to the defendant and used by him at trial.

John Jutte was a lead investigator for the Iowa Bureau of Criminal Investigation. He appeared before the grand jury several times. Through inadvertence, a small portion of his testimony was not furnished to the defense. Jutte's undisclosed grand jury testimony revealed he had timed the distance between defendant's room and the stairway where Roberson met defendant. The defense asserts this short time sequence was helpful to defendant's case. But the defense had a witness do the same experiment with a similar result and used his uncontroverted testimony at trial.

Jutte's grand jury response to a question concerning fingerprints disclosed" * * * actually we have more than two but we are primarily concerned with a couple of them due to condition, location, etc." The defense asserts if it had been known there were more fingerprints in room 429 there would have been an opportunity to investigate further. But Jutte's above statement concerning "condition" is consistent with disclosed testimony there were only two latent prints, plus other smudged prints. Defendant does not dispute trial court's

observation his claim concerning other fingerprints had been "hashed and rehashed during preliminary hearings and during the trial." Nor is there any denial in the record that defense counsel, prior to trial, went to the B.C.I. laboratory and examined "the body of evidence that was in the possession of the B.C.I." We assume this included any fingerprints available from room 429.

The previously-undisclosed grand jury transcript revealed Mary Viner testified Ottens (the victim) had told her of a stranger entering the latter's room a few days before her death. But at the remand hearing the defense conceded this information had been obtained from Viner in a pre-trial interview.

Other issues are raised relating to claimed suppression of testimony concerning a composit sketch of the supposed murderer. However, responses of persons to whom the sketches were shown were vague and conjectural.

We have examined the other claimed instances of suppression of exculpatory information and find them less meritorious than those above mentioned.

In summary, most of the grand jury testimony not furnished defendant conveyed information already available to the defense. It therefore can hardly be classified as "material" in the sense its nondisclosure deprived defendant of a fair trial. See Agurs, supra, U.S. at ,96 S.Ct. at 2399, 49 L.Ed.2d at 352 ("For unless the omission

deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecution's constitutional duty to disclose"); State v.Fryer, supra, 226 N.W.2d at 39-40; State v. Aossey, supra, 201 N.W.2d at 734; State v. McClain, supra, 256 Iowa at 186, 125 N.W.2d at 770; 3 Orfield, Criminal Procedure Under the Federal Rules Sections 26:338, at 649-650 (1966) ("In general there is no prejudicial error if the information withheld is otherwise in the possession of the defendant").

The balance of the information in the grand jury transcript not furnished defendant might arguably have provided a few investigatory leads of highly speculative value. It

may have aided defendant, in the language of Williams v. Wolff, supra, "in some remote or fanciful way." It was not exculpatory per se. It lacked the obvious value and impact of the information we held exculpatory in Peterson, supra. We cannot find it might have affected the outcome of the trial. Trial court therefore did not err in overruling the motion for new trial on this issue. See Agurs, supra, U.S. at ,96 S.Ct. at 2401, 49 L.Ed.2d at 354, 355, n. 20; Williams v. Wolff, supra.

III. Motion to produce.

Defendant's motion to produce and amendment thereto demanded, inter alia, that the State produce all information known to it concerning numerous named and unnamed in-

dividuals mentioned or otherwise described in the course of a loosely-controlled and meandering grand jury investigation. The implication to be derived from the motion is that the grand jury transcript contains no exculpatory information but the response to the motion, if granted, might develop something useful.

Evidence adduced from the prosecuting attorneys at the remand hearing tended to show there was no exculpatory information available in these instances.

We agree with trial court, however, that the motion plunged beyond the limits of our remand order. The motion was properly overruled on this ground. Hetherington Letter Co. v. O.F. Paulson Const. Co., supra, 192

N.W.2d at 809; State v. Mayhew, supra, 183 N.W.2d at 725; Kuhlmann v. Persinger, supra, 261 Iowa at 468, 154 N.W.2d at 864.

Our affirmance on the first appeal was based on the condition exculpatory evidence had not been suppressed. The record now demonstrates there was no suppression. We affirm the judgment and sentence entered below.

AFFIRMED.

All Justices concur, except Rees, J., who takes no part.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA)Filed February 10, 1976
Appellee)
)
v.) ORDER
)
JAMES WENDELL HALL,)
Appellant.)

Petitioner Appellant's Petition for Re-Hearing in the above entitled appeal has been considered by the full membership of the Court and is now refused and denied.

Done this 10th day of February 1976.

/s/ C. Edwin Moore
Chief Justice - Iowa Supreme Court

GRAND JURY MINUTES
(Pg. 198-pg. 201)

We have settled on a man by the name of Hall. I have a check list of reasons why we settled on Jim Hall,and I am going to go over that check list. That's the best way to background it.

First of all, though, he admitted being in Rienow Hall three times on the 13th. He said he didn't know Sarah Ottens initially, then he said, well, I know her by name and by sight. This is what he told the agents. Then later on, he never admitted that he's ever been in her room. He denied this, and never dated her in any way. He fits the description of the man seen on the fourth floor, but also it could

fit other Blacks -- young Blacks -- too. It's not too good. They don't really pick him out of a series of pictures, you see. We have got somebody who says that she thinks he attempted to date Sarah, but she gets this through, I think, second-hand. This Sue Raisheck, we will have her in here today. Also, he is known to beat up Leslie Hall, a White girlfriend. Incidentally, this Jim Hall won't go with a Black girl. He will only go with White girls, which is interesting; maybe something's wrong with the man. Maybe he hates them down deep, you see, but he has beat up this Leslie Hall. Oh, he slaps me a little bit. She doesn't know that he goes with others. She thinks he goes only with her. You

will get to her today, but he does go with others, and so on. Now, she said-- Sarah worked at the cafeteria and she made a statement that she was going to see Bobby's roommate that night. Well, Bobby's roommate is not correct. Bobby didn't have a roommate at that time, if she meant Bobby Rogers, but it could be she got it confused somehow or other. She knew Bobby Rogers; we know she knew him, and it could be that she thought that Jim Hall because he's a close friend of Bobby Rogers was a roommate to Bobby. That's a remark that Sarah made to a girl who works in the cafeteria with her.

We did check. Bobby had a roommate the previous semester and we checked that out.

He didn't have anything to do with it. We almost checked every nut on the campus we could find. We had one nut who even broke into the sorority houses. We checked him out, and he was in Florida, as I recall.

Now, the girlfriend admits he slaps her around, but nothing more than that. He told his girlfriend, Leslie Hall, that he was somewhat involved. Well, then,apparently, there may be a statement where again we get is second-hand, because we have a girl who wouldn't go with Blacks for anything in the world, who was a roommate to one who does. She gives the information that she goes with Bobby Rogers, and she's obviously trying to cover, and things she says to her roommate, the roommate tells us,

and we go to her and she plays it dumb. I don't know. I think the girl is telling the truth -- the roommate -- but this was to the effect that maybe Bobby and Sue had smoked and Jim Hall might have smoked pot here with them on Tuesday. I mean, this is a little unclear -- that statement.

Some say that Jim Hall has a violent temper. He did push a girl in the river -- Iowa River -- and this was because he tried to copy from her test paper and she covered the paper and he flunked the test, so he pushed her in the river. Also there's an incident where twenty-five cents was found and he picked up a bottle like he was going to hit the girl, and she made quite a bit of it, but now she plays it dumb, because

she's the one that goes with Bobby Rogers. We --

BY MR. JOHN BIRSE: Do you have anything in the way of fingerprints?

BY MR. WOODWARD: We're getting to the more important things. Also, I think, we first thought we had a Black boyscout here. He gives that impression. His father is a college teacher and his mother a high school teacher, or something like that. As we went deeper -- when we first heard this -- but as we dug deeper, he is not. I don't want to go into all the things where he isn't at this point, but we have dug in Ohio and have dug deep and he is not all that pure. There is one thing that maybe I will point out. He apparently belongs to a Black

militant --very strong militant group -- in Florida, and I think I will say this. He is also involved in a theft ring. So are some of the others here. We are digging. I believe we have really went into this thing.

JUROR CECIL E. GOODLOVE
(Record pg. 4 - Pg. 23)

PROCEEDINGS

The jury panel was duly sworn and selection of a jury commenced at 9:25 a.m. The selection of a jury and two alternates was completed at 5:35 p.m. the same day (May 9, 1974) and the jury, including the two alternates, was duly sworn. Jury was excused until 9 a.m. Monday, May 13, 1974.

9:10 a.m. Monday, May 13, 1974

THE COURT: Let the record reflect that we are in Cause No. 6115, State vs. Hall; that we are out of the presence of the jury and in the library, with the defendany present along with his attorneys,

and also Mr. Woodward and Mr. Goetz of the prosecution being present.

It is my understanding at this time that the defendant has a motion.

MR. TUCKER: I do, Your Honor.

THE COURT: You may proceed.

MR. TUCKER: Defendant at this time moves the Court to dismiss Cecil E. Goodlove, one of the selected and sworn jurors in this case, from sitting in on the trial of this case, and to substitute in lieu thereof the first alternate as previously selected, and as grounds and reasons therefor states as follows:

That at approximately 12 o'clock noon on this past Saturday, May 11, 1974, I received a telephone call from Attorney James Hayes,

who at that time indicated that he had been talkint to one of the jury panelists on this case, a Tina Baculis, who, during the telephone conversation with him, made the statement to him that Cecil Goodlove, who was sitting next to her during the entire jury selection process on Thursday, had stated to her as they were leaving the court room during one of the recesses, "Let's just hang him and get it over with. I don't want to be on this damn jury." That upon receipt of such information from Attorney Hayes, Mr. Walker and myself went to see him. We confirmed how the conversation came up. Subsequently we had him call Mrs. Baculis. He called her at approximately 12:25 in the

afternoon. She indicated we could come out. That we subsequently drove to her home, which was located on North Summit Street in Iowa City and that we talked to her from approximately 12:45 to 1:15 p.m. on such date, at which time she reconfirmed the statement which she had given to Mr. Hayes. At approximately 1:30 on said date I placed a telephone call to the home of Judge Schultz in Marengo. I assume that his wife answered the telephone and indicated to the operator that he was gone and would be back in an hour or two. That I did not replace the telephone call until approximately 4 o'clock the same afternoon, and at such time again the operator was advised, I think by his wife, that he was at the courthouse. The

number was obtained and I talked to Judge Schultz at approximately 4 o'clock in the afternoon, or shortly thereafter, on this past Saturday, advising him of such fact.

This motion is made pursuant to State of Iowa vs. Coffee, 182 NW 2d 390, and that to allow said juror to remain on the jury and sit on the trial of this matter, based upon the expression which he has made, would be prejudicial to the rights of this defendant.

THE COURT: Does the State resist said motion to exclude this juror?

MR. WOODWARD: Yes, we do, Your Honor, at this time, because we had heard that this particular person, Tina Baculis -- the County Attorney had informed me he believed that

this woman may not be mentally all right, she may be a little mentally unbalanced, and at the time we were selecting the jury we had already felt we could not put her on. I think you have more on that than I do, Carl.

MR. GOETZ: Yes. I would inform the Court that this lady previously made a complaint to my office and came to my office several times concerning alleged irregularities in the Iowa City Care Center and we had invited her to specify the nature of her complaint or the nature of the illegal activity at the Iowa City Care Center, and she failed to specify and failed to come to the office to reduce

these things to writing, though she did orally make statements to us many times.

THE COURT: The motion having been resisted, do you wish to call Mrs. Baculis as a witness?

MR. TUCKER: I do.

T I N A B A C U L I S

being first duly sworn, was examined and testified as follows:

By Mr. Tucker:

Q Mrs. Baculis, would you state your full name, please?

A It is--the real name is Stomatina S. Baculis, but it is Tina S. Baculis.

Q Mrs. Baculis, you were one of the jury panelists this last Thursday at the time the jury process first started in the case.

against James Wendell Hall, is that correct?

A That's correct.

Q As I recall your name was one of the first 16 drawn and as I recall you sat in seat No. 15, is that correct?

A Yes, that's correct.

Q And sitting next to you, also among the first 15 drawn, to your right, in seat No. 14, was a gentleman by the name of Cecil E. Goodlove, is that correct?

A That's right.

Q We had, did we not, discussions last Saturday concerning Mr. Goodlove?

A Yes, we did.

Q Would you tell the Court, please, as to any comments made by Mr. Goodlove while you were still sitting in the court room through-

out Thursday, May 9th?

A Yes. The largest conversation by him was as we were leaving the court room at the morning recess. However, all during that time he kept leaning over and saying, "I'd like to get the hell out of here," and, you know, "I wish this damn thing was over with," and, you know, slurs and remarks like that, that he did not want to be on the jury. He stated that to me and I thought it was strange when you questioned him that he didn't say this to you, or even to Mr. Woodward. But as we were recessing and walking out I got up to leave before the judge left, I started walking and then I went back to my place, you know,

it was just a jiffy, and the rest of the people were leaving, and I was right alongside of Mr. Goodlove and as we were going out he leaned over and said, "I don't know why they just don't hang him and get it over with," and I said, "Gee," and just looked at him and kept walking. I didn't want to go home so I left and went to Mrs. Rogers' office to get coffee and all during the afternoon he kept saying things like he would like to leave, and he does not want to be on the jury.

Q All right. Now, Mrs. Baculis, as I understand it you also subsequently related this conversation to Mr. Hayes, is that correct?

A Yes. Mr. Hayes is part of the law firm,

we deal directly with Mr. Sueppel and I had a very--we want to purchase some property and I had a very important question to ask Mr. Hayes because we have to submit an offer to buy this morning, and so I happened to call him to find out information and then he said, "Why can't you call Bill Monday?" I said I had to report for jury duty again, and Mr. Hayes said, "Oh, are you a jury person?" I said yes, and he said to me, "Why aren't you on the jury for Hall?" and I said, "Well, I was one of the first 16 selected, but I didn't get on it," and I went on to say--we have a very good relationship with Mr. Sueppel, he has been our attorney for a long time, and I said, "To be honest with you, I don't

think I would want to be judged by some of the people on that jury, " that was my opinion.

Q But you did subsequently relay the matter to Mr. Hayes?

a Yes.

Q And he subsequently called you and advised you that he had advised Mr. Walker and myself of this fact?

A Yes, he called me back.

Q And subsequently Mr. Walker and I came to see you on that Saturday following the conversation?

A That's right. That is exactly right.

Q Was there any other person close enough who could have heard his statement to you as you were walking out of the court room?

A I don't know for sure. He leaned over to say this to me and I can't really say if anyone else heard. I doubt it but it's possible. There's a big rumble as people are leaving and he leaned over to say this to me.

MR. TUCKER: Thank you. No further questions.

By Mr. Woodward:

Q Do you remember who was sitting on the other side of Mr. Goodlove?

A No. I think it was another lady.

Q He wasn't talking to her?

A No, he didn't say anything to her, he just kept leaning over to me and I thought that was a little strange. He kept saying these little--every time he would shift

in his chair he would grumble.

Q Were there other people making remarks like this?

A No. He was the only one, he was the closest one to me and he made this remark.

Q When he talked to you was he just impatient with the jury selection?

A I would say he was impatient with the whole situation, yes.

Q In other words, he was sitting there throughout the day listening to questions that became probably somewhat repetitious. Would it be unusual for anybody to kind of wish they were somewhere else?

MR. TUCKER: That is objected to as calling for a conclusion, argumentative.

The fact also is that the statement was made during the morning recess.

THE COURT: Sustained.

Q All I am trying to find out is, was--do you feel any of his conduct was unusual up to the time he leaned over and talked to you going out the door?

A Yes, I do. I think it is a very serious situation and I don't think anyone who is going to sit and pass judgment on anyone has the right--I mean you should listen and know exactly what is going on, in the event you are selected, and as a judging person, no, I don't think you should--I think you should state your position in the beginning and that you are not interested in being on the case, rather than making a hasty or bad

decision when someone else's life is at stake. I think that was wrong.

Q When he leaned over when you were going out the door and made this statement, what were the exact words?

A He said, "I don't know why they just don't hang him and get it over with."

Q He didn't say anything else?

a No. I didn't give him the opportunity, I woaked off, I didn't want to hear this kind of talk from anyone.

Q Had you been saying things to him all day?

A I kept telling him to be quiet. Every time he did say something I would say, "Would you please be quiet," or, "Would you please shut up?" I told him maybe

two or three times to please be quiet.

Q Had you expressed your views concerning the case to him?

A No, I didn't express anything to him, I didn't want to talk to him. I made it very clear to him I would not stand around

Q Between yourselves?

A That's right.

Q And I instructed you on this several times during the day, is that right?

A That's right. That's why I would not discuss this with him.

Q And this was done before he made these comments to you?

A You instructed us at the very beginning before the morning recess, if I recall

correctly. You said you didn't want any of us to discuss anything with anyone about this case.

Q Including among yourselves?

A That's correct.

Q Did you hear any other jurors talking among themselves in regard to this case?

A No, I didn't. No, people were asking like how long do these things last, how long might this screening go on, questions to that effect.

Q When Mr. Goodlove made this statement to you was it in the terms of jest, or--in your opinion?

A It could have been just jest.

Q Did he appear to be a jovial person?

A No, he appeared to be a grouchy man.

Q You stated you did not know whether anyone else overheard--and this would be understandable-- you couldn't know whether anyone else overheard.

A No.

Q But do you have an opinion whether it would be possible for anyone else to have heard?

A Unless someone was very close or leaning forward they couldn't have heard, but I don't think this is likely, because he leaned over to say this to me, it would be as though we were walking out of the room and I leaned over and said something to you, it may not be heard by other people.

THE COURT: Do you have any more questions,

Mr. Tucker?

MR. TUCKER: No, Your Honor.

THE COURT: Does the State have any further questions?

MR. GOETZ: Yes. I would like to find out, do you know the name of the person sitting on the other side of the juror Goodlove?

A No, I don't. I think it was a lady and her name may have been Dietsch.

THE COURT: My record shows that juror No. 264, a sworn juror on this case, is Kathy Mae Dietsch.

By Mr. Woodward:

Q Did he ever speak to her that you know of?

A She was ahead of us, I don't know if he spoke to her, he just made these little grumbles all day, but he made this one particular comment as we were walking out, if would be as if we were all leaving this room and Mr. Goetz leaned over to say something to you.

Q Had you indicated to him during the day as he grumbled that you didn't want to listen to him?

A Yes, I told him to be quiet. Please shut up.

Q So it may be that he thought he was getting at you, getting under your skin?

A My talking to him was not prior to the recess, I ignored him most of the morning until recess. He made me very angry and I

have a short Greek temper and I wasn't about to start arguing with him or saying anything back, but I did tell him in the afternoon and after recess in the morning to be quiet and please shut up. Yes, I did.

Q How did you end up talking with Attorney Hayes rather than Mr. Sueppel?

A Mr. Sueppel was out of town. A lot of times I have called and had a question and I have called Mr. Meardon, I have talked to the whole office, we know them and deal with them, they have handled several property buyings and sellings for us, and we want to buy the property directly across the street from us and we don't want it to go on the market, so it was very important that I get legal advice from Mr. Hayes be-

cause I don't know if we could financially--
it was a very different situation and I didn't
know whether we could financially take this,
and Mr. Hayes indicated there was no reason
why we couldn't.

Q Had Mr. Hayes called you?

A I just call him and ask him a question
over the phone, it's no big deal. We deal
with them all the time. I just wanted to
know if we could financially stand it, the
burden of a note coming due in two years,
and he said, "Of course you can." Mr.
Sueppel and we have a good relation, it's
not like having qualms about calling the
office if I had any problems. They represent
us.

Q Did you have in mind to call them to

tell them about this?

A Not at all. Jim Hayes--we're both
Decocrats and have worked on different
campaigns. He just wanted to say something
else too, and we chit-chatted for a second
after he answered my question, and he said,
"Why don't you call Bill Monday?" and I
said I couldn't, I have to report for jury
duty, and we started our conversation and
that's how we got into this thing.

Q He inquired into this, then?

A No. He just asked me why I wasn't on the
jury and I said "Well, because I wasn't
selected," and he said, "Oh," and I said,
"To be very honest, I wouldn't want to be
judged by some--" and then we got into the
conversation.

MR. WOODWARD: I have nothing further.

THE COURT: You may be excused.

(Witness excused)

THE COURT: Gentlemen, in State vs. Coffee, which Mr. Tucker referred to, the Supreme Court suggested several methods of taking action to forestall prejudice. The first of which is that it could have questioned the juror to determine if any actual bias existed. Secondly, it could question other jurors to see if bias or prejudice have been injected into the jury room by this juror. Mr. Tucker and Mr. Woodward, at this point in the proceedings do you see any necessity of questioning the jury panel in view of this lady's testimony, which would indi-

cate that the conversations were fairly private?

MR. TUCKER: I do not, Your Honor.

MR. WOODWARD: I do not, either.

THE COURT: In regard to questioning this juror, do you have any objection to the Court calling him as a witness and asking him about bias and asking him if a statement was made as outlined here, and at the conclusion of it if he remains as a juror instructing him that he should disregard this and not discuss it with other jurors, and so forth, and that he is called as the Court's witness?

MR. TUCKER: The defendant would object to that procedure. Defendant has no objection to the Court calling him but I

think that once this matter becomes known to the juror--and I think he has a right to know why he would be excused, if he is excused-- I think that such juror should be advised that he is not to discuss this matter with anybody else until this is completely over, so that this matter does not become a matter of public knowledge, but I feel if you call this juror and inquire concerning this statement or any bias which might exist, that a definite bias would be created which could not be dispelled, and this would work presumptively to the prejudice of the defendant. I don't think after discussing this with him he could sit through the trial of this case and not wonder what happened, and whether or not he was having

a finger pointed at him and being isolated.

THE COURT: It was my intention to tell him that one of the other jurors, specifically this woman, had made the statement, and she is not a juror. My problem is, Mr. Tucker, if I don't--if I accept on fact value--

MR. TUCKER: I understand, and I have no objection to telling him but I have objection following talking to him, no matter what he states, as to his continuing on this jury.

THE COURT: Mr. Woodward?

MR. WOODWARD: I think the only way to proceed is for the Court to talk to this juror and make it clear that the

State and defense are not involved in this. In other words it should not be indicated in either way who is objecting to this man. This is the sort of thing that I would think also we in no way should participate in any questioning.

THE COURT: That I would have to reserve thoughts about.

C E C I L G O O D L O V E

being first duly sworn, was examined by the Court as follows:

Q Mr. Goodlove, the Court has called you as a witness on its own behalf. I want to make it crystal clear to you that you are not being called by either the State or the defendant, that this is the Court's motion.

There has been brought to the attention of the Court that there were certain conversations during the jury selection the other day and I would be very specific: Mrs. Baculis, who has not been called on the jury panel but who sat next to you, indicated that you had made comments to her to the effect that "I don't know why they don't hang him and get it over with." Do you recall if such a statement was made?

A No, I don't recall.

Q Could a statement like this have been made in jest or otherwise?

A I don't even recall making it.

Q Did you talk to her during the day?

A No. As soon as I was called I was sitting

next to Mr. Donnelly and the other woman--
she got up and moved.
Q I am specifically talking about the morning during the jury selection where you would have--you were in seat 14.
A Let's see, there was seven over, let's see, I sat on the end, on this end of the first row.
Q Was Mrs. Baculis sitting next to you?
A I don't know. I don't know her.
Q Did you during the--that would have been to your left, I believe. Do you recall Mrs. Dietsch, who was sitting on your right, who was selected as a juror?
A She was sitting where?
Q In seat No. 13, she would have been the first juror out that wasn't in the jury box

during the morning proceedings.
A No.
Q Do you recall making any statements like, "I would like to get the hell out of here," or, "Hurry it up," to Mrs.--
A No.
Q Did you ever talk to Mrs. Baculis during the proceedings or during recesses, or any other time?
A No. I stayed strictly alone during the recesses. I stood over here by this wall most of the time.
Q Did you ever talk to her as you were leaving the jury room--the court room?
A I talked to a woman walking to my car, we was talking about the weather then, how cold it was, when I was walking down the

street down here.

Q Mr. Goodlove, no one is accusing you of anything in this, but the Court must be certain that it has a fair and impartial juror--that all of you ar. Do you have any bias or feelings?

A No, absolutely not. When I got home I gave my wife strict orders, "Don't you ever ask me anything," and I told the kids, "Don't you ask me anything." No, I have no bias whatever. I just don't believe in that.

Q Do you feel by being called in here and singled out that--has this upset you in any way or made it difficult?

A No, it don't upset my thinking at all, it don't upset my thinking at all, no. But I don't recall making any statements to a

woman. I just don't recall.

Q Could you have said something to her in jest?

A I could have but I just don't remember it. I could have, I won't say that I did. I don't believe I did, because I walked up town to dinner alone.

Q But I am specifically referring to the recess on the morning of last Thursday at a time when you were just getting ready to leave the court room.

A I just don't recall it. I just don't recall it. No, because I wouldn't--I am just not that way, I just don't have no bias whatsoever.

Q Could it have been conceivable that you would have said "I don't know why they don't

hang him and get it over with?"

A No, I wouldn't say that. I just would not have said that. I don't believe in that kind of business at all.

Q Do you know of any reason, including this hearing here this morning, Mr. Goodlove, any reason at all that would make it difficult for you to act and treat both the State and the defendant other than fairly and to decide this case solely on the evidence presented and the instructions of the Court?

A No.

Q If you have any hesitancy about it I want to know about it.

A I have no hesitancy at all.

THE COURT: You may be excused, I

realize that this is difficult, but I am instructing you not to discuss--not only not to discuss this with other members of the jury panel at any time during the trial, but in no way to allow this hearing to affect your deliberations or anything that you should do in any way. Can you follow that instruction with no problems?

A I could follow them without any problems whatsoever.

THE COURT: Thank you. (Witness excused)

MR. TUCKER: I would add to the Court solely in reference to the statements that he was incorrect in so far as to where he was sitting. The jury selection chart very clearly shows he was sitting in seat

No. 14, that in seat 13 on his right was Kathy Mae Dietsch, in seat No. 15 to his left was Tina Baculis. He was not sitting next to a Mr. Donnelly nor was he in row 7.

MR. GOETZ: I think he was referring to the time he was in the court room waiting to be called, he spoke of sitting next to Mr. Donnelly.

THE COURT: Was Mr. Donnelly even called? Yes, he was No. 3 juror.

MR. GOETZ: No, there was a Mr. Donnelly on the panel that was not selected at all.

THE COURT: No. 267.

MR. GOETZ: Yes.

MR. TUCKER: Mr. Robert Donnelly, 267,

was in seat No. 3.

THE COURT: There is a Mr. Harold M. Donnelly also. Was he selected?

MR. TUCKER: No.

THE COURT: The Court overrules the objection, having heard both witnesses. The Court, frankly does not believe the testimony of Mrs. Baculis, and the juror will remain on at this time. This does not prevent the defendant from raising this matter before it is submitted to the jury.

MR. TUCKER: As the Court knows, the defendant excepts, which is automatic, to the ruling of the Court, which exception shall continue.

JUROR JAMES M. HOUSEL
(Record pg. 763 - pg. 768)

THE COURT: Gentlemen, we are out of the presence of the jury. Where is the defendant? And in the presence of the defendant and all of the attorneys. Gentlemen, the bailiff has informed me that juror No. 11, James M. Housel, approached him this morning. Mr. Griffin, what did the juror tell you?

BAILIFF GRIFFIN: Mr. Housel stated to me that he felt that he should be removed from the jury because of the fact that the longer this trial went the more he has heard about it and is not to the best of interest of his, or, he felt, to the defendant, that he could serve any more. He

stated that he said this at the beginning of the trial, not that sentence, but he had heard something about it, at the beginning.

THE COURT: Did he indicate he had been contacted by any specific person or persons, not identifying them, but specific persons?

BAILIFF GRIFFITH: No, sir.

MR. WOODWARD: Is it possible he was thinking in terms of what he already alluded to when he was being selected as a juror?

BAILIFF GRIFFITH: I really can't say.

MR. TUCKER: Mr. Griffith, did he specifically state that he couldn't be fair to the defendant or did he state that he didn't feel he could be a fair juror?

BAILIFF GRIFFITH: A fair juror.

MR. TUCKER: Did he use the words that he couldn't be fair to the defendant?

BAILIFF GRIFFITH: He didn't say defendant, but I will say he inferred that, the way he stated it.

MR. TUCKER: From the way it was stated to you, your inference was that he would not be fair to the defendant if he continued on the trial, is that correct?

MR. GRIFFITH: That is correct.

THE COURT: Dis you tell him not--to follow the admonitions of the Court and not to discuss this with any other juror?

BAILIFF GRIFFITH: Yes, sir. I said to no one.

Period.

THE COURT: Do you have any further

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questions of Mr. Griffith, the bailiff?

MR. TUCKER: No, sir.

BAILIFF GRIFFITH: This happened, I might add, as he came in and got to the top of the steps this morning.

MR. TUCKER: This would have been prior to 9 a.m. this morning?

BAILIFF GRIFFITH: No, because he was late. It was 9:05, and he was the last juror to arrive. He was approximately five minutes late.

THE COURT: Does the State have any suggestion as to how this matter should be handled?

MR. WOODWARD: Of course the thing is, I recall this juror as he was being selected stating he had heard some rumors and he was asked if he could set them

aside and he said he could, and he was questioned by both of us, and you know one of the problems you have with any of these jurors, as they get close to the point where they actually have to make a decision then you run into this problem of whether-- they are just going back to the rumors they heard which they said they could put aside and are now hoping they don't have to make a decision. This is the only thing bothering me. We have two alternates. I mean, I want a fair jury, but how many others may, as they get right down to having to make a decision, how many are going to think of reasons why they rather not. That bothers me a little bit. I

I don't think either the State or defendant's attorney should question this juror, but I wonder if maybe the Court could question this juror as to whether this is something that has occurred after--now if he has been contaminated after this case is started, then I think we definitely have a juror that shouldn't be there. But if it is just a matter of things that didn't bother him enough when we started are now giving him an excuse not to do his duty of making a decision, that is something else, you see.

THE COURT: Mr. Tucker, do you have anything at this time?

MR. TUCKER: I feel he shouldn't be contacted by the Court at this time. We

previously have had Mr. Goodlove, who is seat No. 7, contacted. I am assuming he is following the instructions of the Court and has made no mention of it to any of the other jurors. I think if Mr. Housel were contacted at this time we might start to get some type of suspicious aspect in so far as the other jurors as to why did these two events happen. I also would indicate to the Court that in view of what the evidence has been and what I contemplated it to be I have prepared a written motion to direct a verdict, and, briefly, in support thereof, which upon the conclusion of the plaintiff's evidence will be filed, which I believe deserves serious and meritorious consideration by the Court, and I

am sure it will get it. If that motion should be sustained the question as to jurors is a moot question. If not, then we still have two alternate jurors, and at that time there could then be a question as to whether or not there could be a substitution, not only for Mr. Housel, but for Mr. Goodlove.

THE COURT: In the event this juror would again contact Mr. Griffith--and you know that I have urged each one of them to contact the Court if they have been in any way interfered with or anyone has attempted to talk to them--shall I instruct Mr. Griffith to put it in writing and submit it to the Court, or to do nothing but report it to the Court?

MR. TUCKER: I think if this happens again my position would be changed and the Court under the circumstances should make inquiry of the juror.

THE COURT: Mr. Griffith, in the event this juror mentions it again, attempt to recall in detail what he has told you and tell him that all you can do is tell the Court.

BAILIFF GRIFFITH: He just asked me again and almost insisted this time, before it started,to speak to you.

THE COURT: Gentlemen, I will not speak to the juror outside of your presence.

MR. TUCKER: I would feel if the request is persistent or continuously made that he wants to talk to you that there be

alternative.

THE COURT: If he makes the request again, the Court will then instruct the bailiff to discreetly tell him to be in court at 8:30 tomorrow morning and we will notify counsel so we might be able to do this without having the other jurors know what he has. Were any other jurors present when he talked to you, Mr. Griffith?

BAILIFF GRIFFITH: No, they were all in the jury room. He was the last one that came in. Just now they were in there, I took him in the other court room.

THE COURT: In other words the other jurors would have knowledge of this contact?

BAILIFF GRIFFITH: None, sir. Unless

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he has said something, if he has, out of my presence.

THE COURT: Thank you.

(The jury was summoned and all returned to the court room.)

JUROR JAMES M. HOUSEL
(Record pg. 1106 - pg. 1111)

(The juror James M. Housel entered)

THE COURT: We are having a hearing and you have asked the bailiff on occasions about sitting on the jury, and another matter has come up and I want to get into the hearing, but I want your testimony to be sworn, so would you raise your hand and be sworn?

(Juror Housel was duly sworn by the Court.)

THE COURT: Mr. Housel, it has been called to the attention of the Court that you had a conversation with Attorney Daniel Bray yesterday and also the Court has--there has been called to the Court's attention by the bailiff that you had stated you had some

previous knowledge which you testified to on voir dire of the facts concerning this case, and it was making it difficult for you to sit as a juror.

MR. HOUSEL: The thing that made it extremely difficult is what it is is confidential information from the university files, which my wife told me, and it has gone no further than that, and this was last fall, a year ago. This is why I said when you were asking me could I differentiate from this as a substantial fact. I know not whether it is a substantial fact or not, but it was a letter a girl write and she sent it in and it was concerning James, and the girl had flunked out and was writing to get back into classes, and

what it was, was evidently her room mate or some similarity close to that, or a girl friend of hers, had been dating him and she had been, oh, the words Chris used, beaten by him a couple times, and she read the letter, so as far as substantial facts, you know, if she had the letter I naturally would believe my wife if she told me something.

THE COURT: Have you discussed this with any other juror?

MR. HOUSEL: No, I haven't. I have been-- I knew it was something that they shouldn't know, and if I myself wasn't sure I could do it, I didn't want to present it to anybody else, and after I was accepted on the jury I, you know, more and more thought

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about it, and thought about it, and after that whole week and the week end to think about it I just wasn't sure I could separate this and this, because I knew that that didn't qualify that in this case for murder,but it does give a violent type background.

THE COURT: Do you think it would be difficult for you now to sit as a fair and impartial juror?

MR. HOUSEL: Well, the closer we get to it, I think--I think--I think I can, and I say this because the more we get closer to it the more I think I can go ahead and try and take the facts as that and forget what I know and just, you know-- well, I really don't know how to say it, it's just

I think I can, but you know, I'm still not sure it wouldn't enter into or influence me at all.

THE COURT: I want you to think about this very carefully again, and I am more or less repeating the previous question I have asked; are you positive that you have not in any way communicated any of this knowledge or any knowledge that you may have, to any other juror?

MR. HOUSEL: I am positive.

THE COURT: Have you heard any discussions among members of the jury?

MR. HOUSEL: None whatsoever. We sit in there and just play cards and keep our whole mind off everything in there as far as the trial has been going.

THE COUNSEL: Do counsel have any questions:

By Mr. Tucker:

Q Mr. Housel, even though you have not discussed, for example, the letter which as I understand you didn't discuss yesterday, but you did say to Mr. Bray and to Don Schleisman that you had information--

A Yes.

MR. WOODWARD: I may be wrong, but it seems to me there was a case where attorneys weren't supposed to ask questions, these questions. I may be wrong.

Q I must ask the question, have you expressed not the nature of any facts or details, but have you expressed to any of the jurors the fact that you had indepen-

dent knowledge as to matters within this case and wondered why it hadn't been out in evidence yet?

A They know, you know, that I had other matters that were influential, in my opinion, but I never told pro or con.

Q But you did tell them t that you had matters within your knowledge which were influencing you, is that right.

A Right. They know that. They knew that from the day go.

Q Why and how did they know that?

A Because I told you I didn't know whether I could separate it at that time.

Q Bud did you tell that to any members of the jury after the jury was selected?

A It didn't really go any farther than

that, no. I might have said, "I don't understand why I was picked," just because of what I said that day, and everybody pretty well remembered what I said that day, but it hasn't really come out again.

Q But as I understand it you have indicated to the jury that basically you have matters within your knowledge which either you felt you wondered why you were on the jury--

A That right there.

Q --or you wondered whether they would come out in evidence?

A Not so much whether they would come out in evidence but wondering why I had really been picked on the jury. The thing struck me funny, was, I said--I said I didn't know for sure, I think I said I wasn't

positive I could separate them, you know. Why--I really didn't see myself as a select type juror in that case.

Q You subsequently, after the jury was selected, made the same type of comment or inference to the other 11 jurors, or some of them?

A I think the only thing I have ever said is, you know, "I don't understand why I am on the jury," for the same reasons I said the first day, and I would have said it probably just like that to anybody there if I ever mentioned it like that, and I am sure I probably have said it like that.

Q To the effect that your wife had knowledge?

A No, I don't think I ever pulled her into it, I didn't ever say where my knowledge

came from, I just said as a cross reference from working down town and my wife at the university and at a period of time when neither one of us would have suspected I would have been on the jury.

MR. TUCKER: Thank you.

THE COURT: Mr. Housel, I am going to excuse you from jury duty. In order to protect the balance of the proceedings I am going to ask you to still follow the admonition that the Court has given, even though you have been excused from jury duty, until this trial has finished and the verdict is in, not to discuss this case with anyone as to the reasons why you were excused,and so forth. Thank you.

MR. WOODWARD: By way of clarification, does this mean at this time you want him to leave or do you want to wait until we are through with the arguments?

THE COURT: I believe that the fact that he has been brought out of the jury room and consequently the rest of the jurors must know that he is being questioned, that he will be excused as of now, and I will have the first alternate take his seat when we resume trial.

AFFIDAVIT OF CHERYL K. HINMAN

I, Cheryl K. Hinman, after first being duly sworn on oath depose and state that I was on the jury panel for the trial of James Wendell Hall.

While the selection of the jury was being made, I was seated next to Mr. Angerer who eventually was the jury foreman for the James Hall trial.

During the course of jury selection, Mr. Angerer and I engaged in a conversation. I had fallen that day and hurt my hip, and I was quite uncomfortable. After the trial was over, I spoke with Mr. Angerer on a Saturday night in June, 1975, at the Highlander Supper Club. He had been talking to Bob Winter when I walked up to the front desk. Mr. Winter left to seat some people,

and Mr. Angerer asked me how my hip was feeling. At first I didn't remember what he was talking about, and then I recognized him and replied that I was fine. I do remember that he then said, "Well, we really did it." I said, "What?", and he continued to say something to the effect that they really put the black guy in jail, so the streets were safe again. He definitely made reference to the race of Mr. Hall, but I didn't remember his exact words. It struck me as being strange that a member of the jury would be bragging about such a serious trial and its outcome. I excused myself and went back to work. The statement bothered me so the next day I told my husband. He said I should call Mr. Bruce

Walker and relate to him the conversation of the preceding night. I then learned Mr. Angerer was the jury foreman, and I was even more shocked by his words. Mr. Walker said they would take note of my conversation with Mr. Angerer and place it in their files. At this time I've been asked to make a statement concerning that night. I apologize that I cannot now remember all of Mr. Angerer's exact words, but I do remember the bragging manner and the racially prejudiced references in regard to the conviction of James Hall.

/s/ Cheryl K. Hinman
CHERYL K. HINMAN

STATE OF IOWA)
) SS:
COUNTY OF JOHNSON)

I, Cheryl K. Hinman, being first duly sworn, do upon oath depose and state that I have read the above and foregoing statement and know the contents therein; and that the statements contained are true and correct to the best of my knowledge and belief.

/s/ Cheryl K. Hinman
CHERYL K. HINMAN

Subscribed and sworn to before me by Cheryl K. Hinman this 8th day of January 1976.

/s/ Judith Lee Casey
Notary Public in and for Johnson County, State of Iowa.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee,	)Filed:)March 28, 1977)
vs.	)No. 59289)
JAMES WENDELL HALL, Defendant-Appellant	) ORDER)

Defendant-appellant's application for additional delay in issuance of procendendo in the above entitled cause is granted.

It is ORDERED procedendo in the above entitled matter be withheld for a period of ninety (90) days from February 22, 1977 to afford defendant-appellant time to apply to the United States Supreme Court for review in this matter.

In the event the Suprem eCourt decides to review this matter it is further ORDERED

no procedendo issue until disposition is made by said court. In the event the Supreme Court rejects the application for review then procedendo shall issue forthwith.

It is further ORDERED that unless a proper timely application is made for review to the United States Supreme Court then procedendo shall issue.

Done this 28th day of March, 1977.

/s/ C. Edwin Moore
Chief Justice - Iowa Supreme Court

Supreme Court, U. S.
FILED
JUN 9 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1577

JAMES WENDELL HALL,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1976

No. 76-1577

JAMES WENDELL HALL,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that a writ of certiorari be denied to review the judgment of the Supreme Court of the State of Iowa entered on February 10, 1977.

CITATIONS TO OPINIONS BELOW

(1) Johnson County District Court decision July 2, 1974 denying new trial and arrest of judgment (Unreported —Reproduced in Petitioner's Appendix, Page 1a).

(2) *State v. Hall,* 235 N. W. 2d 702 (Iowa 1975) (Petition for rehearing denied April 12, 1976—Reproduced in Petitioner's Appendix, Page 174a).

(3) Johnson County District Court hearings of January 9, 1976, January 30, 1976 and February 13, 1976, resulting in decision February 27, 1976 (Unreported— Decision printed in Petitioner's Appendix A, Page 159a. Hearings reproduced in part in Respondent's Appendix, Page 1a).

(4) *State v. Hall,* 249 N. W. 2d 843 (Iowa 1977) (Petition for rehearing denied February 10, 1977—Reproduced in Petitioner's Appendix A, Page 202a).

—o—

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

—o—

QUESTIONS PRESENTED

1. Does the alleged prosecutorial misconduct before the grand jury indicting Petitioner deny Petitioner Fourteenth Amendment and Sixth Amendment Constitutional

rights and, if so, does Petitioner show cause on these grounds for granting his Petition for Writ of Certiorari?

2. Did the Respondent fail to produce and the trial court fail to order production of an alleged fingerprint on a matchbook cover and, if so, does Petitioner thereby present cause on these gorunds for granting his Petition for Writ of Certiorari?

3. Did the trial court err in overuling Petitioner's motion for a directed verdict and, if so, does Petitioner show cause on this issue for granting his Petition for Writ of Certiorari?

4. Did the trial court err in denying the Petitioner's Motion to Suppress the Testimony of Rosemary Jones and John Reding and, if so, does Petitioner show cause on these grounds for granting his Petition for Writ of Certiorari?

5. Did Respondent's prosecutor in violation of Petitioner's Constitutional Fifth Amendment rights improperly comment in closing argument on Petitioner's failure to testify responding to argument inviting comment by Petitioner's attorney and, if so, does Petitioner show cause on this issue for granting his Petition for Writ of Certiorari?

6. Did the trial court err regarding certain trial jurors' alleged misconduct and, if so, does Petitioner show cause on these grounds for granting his petition for Writ of Certiorari?

7. Was there sufficient cumulative error to have warranted a new trial; and, if so, does Petitioner show cause on this issue for granting his Petition for Writ of Certiorari?

STATEMENT OF THE CASE

Jurisdiction is claimed under 28 U. S. C. § 1257(3) from failure to grant Petitioner a new trial on final judgment of the Supreme Court of Iowa on January 19, 1977. On February 10, 1977 petition for rehearing thereon was denied by the Iowa Supreme Court.

No issue in the Petition for Writ of Certiorari filed by Petitioner was raised or considered by the Iowa Supreme Court in the January 19, 1977 case. *State v. Hall,* 249 N. W. 2d 843 (Iowa 1977). All issues were raised and considered adversely to Petitioner in *State v. Hall,* 235 N. W. 2d 702 (Iowa 1975) in which conviction was unanimously affirmed, conditionally; being remanded to allow grand jury transcript pages not before the Iowa Supreme Court to be examined for exculpatory evidence. The January 19, 1977 Iowa Supreme Court case confirms without dissent that no exculpatory evidence was found.

The following facts were introduced at Petitioner's trial.

On March 13, 1973, Sarah Ottens, a 19 year old freshman nursing student was found murdered in a fourth floor dormitory room she occupied in Rienow Hall, University of Iowa Campus, Iowa City, Johnson County, Iowa.

Petitioner, James Wendell Hall, who occupied a student room in another dormitory across the street, with drapes parted, could see from his room into Miss Ottens' room.

It was during the "spring break" and almost everybody who did not go back home went somewhere else. Em-

ployment at a hospital had detained Miss Ottens from going home. On the preceding night she had been the sole occupant of Rienow Hall's fourth floor. The afternoon of March 13 another young lady returned to her Rienow Hall fourth floor room. During "spring break" Rienow Hall outside doors were locked at night, but students staying on campus were given an entrance key and anyone could exit by push bar.

Near midnight the female student who had returned that afternoon discovered Miss Ottens' body on her way to a rest room across the hall from Miss Ottens' room. She immediately summoned her boyfriend from her room and thereafter authorities were quickly notified.

The victim was wearing only a blouse. Her jeans and panties were found rolled together on the floor beside her. The cause of death was asphyxiation caused by strangulation. Death occurred, in the pathologist's opinion, between 3:00 P. M. and 9:00 P. M. However, recognizing uncertainties, he first placed the time of death between 12:00 noon and 11:00 P. M.

Testimony placed Petitioner, on the date of the murder, knocking on Miss Ottens' door at about 3:30 P. M. and on Rienow Hall steps between the fourth and fifth floors at about 10:30 P. M.

A pathologist with reference to bruises, skin texture, measurements and other factors testified that a broom found at the crime scene was the burder weapon, being first used to pin Miss Ottens at the shoulders and then slipped to her throat to strangle her. After death an object like the broom handle had been rammed up the anus

of the victim. The broom contained fecal material on the handle.

Also, after death, an indentation on the top of the victim's head was made which was about two inches by one-fourth inch in size. The object causing it, according to the pathologist, would have to be rounded, semi-rigid, and employed with great force. One of Petitioner's gym shoes seized by search warrant from a closet in his room was found to have one long and one short intertwined hairs wedged under the laces at the toe. The shoe had a heavy rubber sole and the toe was rounded and semi-rigid. A strand of one of the hairs taken from the shoe was found to be consistent with the victim's hair.

A hair from Petitioner's head was compared with the only human hair (not the victim's) found on the victim's blouse and found to be consistent. An expert testified that if 50 persons in the courtroom gave a hair sample she would expect only two or three to be consistent.

The victim when found had damp hair and her face appeared to have been partially washed or drenched in water. She had bled from the nostrils. A wash basin in the room was filled with water, the stopper having been inserted in the drain. The wash basin appeared to have blood colored water in it . A damp bloody colored spot was on the floor by the sink containing the pattern of a head of hair. The body was stretched out a short distance from the sink.

The right (cold water) faucet handle had a latent thumb print on it. The position of the print indicated a left thumb had pressed against the handle palm down, thumb pointing to the right of the person facing the sink,

a position allowing a person to hold a body up with the right arm. This thumb print was compared with the left thumb print of the Petitioner and the State's fingerprint expert testified that in this opinion the thumbprint on the faucet handle was Petitioner's.

A Johnson County, Iowa, grand jury indicted Petitioner on September 19, 1973.

On May 23, 1974, after several pre-trial hearings, upon the foregoing evidence and other circumstantial evidence Petitioner was convicted of murder in the second degree by verdict of a Johnson County petit jury. Upon denial of a motion for new trial Petitioner was sentenced to 50 years imprisonment.

REASONS FOR DENYING THE WRIT

I.

Alleged Prosecutor Misconduct Before Grand Jury

Petitioner alleges that the prosecutor injected racially prejudicial matters into the proceedings before the grand jury. The Iowa Supreme Court found no misconduct of the prosecutor relating to race. Petitioner relies upon the fact the prosecutor said to the grand jury: "also, he is known to beat up Leslie Hall, a white girl friend. Incidentally this Jim Hall won't go with a black girl. He will only go with white girls, which is interesting; maybe something's wrong with him. Maybe he hates them down deep, you see, but he has beat up this Leslie Hall." Petitioner

asserts this remark was to inflame the jury and that he may have had some hatred of white girls was an amateur psychological guess. It is more likely prosecutors were acting in consultation with a clinical psychologist at the time. Unfortunately, a search of the record establishes neither position. The grand jury transcript does not contain all the proceedings of the grand jury. (Respondent's Appendix pp. 19-20 from transcript of remand hearing pages 41-43.)

At this time it is common knowledge (see, e. g., *New York Times,* Monday, April 18, 1977; *Des Moines Register,* May 30, 1977; *Des Moines Register,* June 6, 1977) that police are looking for a suspect with the tag name "Son of Sam" who may be the person in the Bronx and in Queens murdering *females with shoulder length brown hair.*

The grand jury in search of motive could not disregard the possibility of a male person of one race having a mental condition that resulted in a compulsion to commit violence upon a female person of another race. The grand jury transcript also shows the grand jury investigated Petitioner for a possible "discovery in the act of committing a burglary" motive. The reported case, *State v. Hall,* 235 N. W. 2d 702 (Iowa 1975), discloses that both of these motives were not introduced at the trial.

For cross-examination purposes, grand jury testimony of witnesses who testified at the trial were turned over to Petitioner. When transcript pages of grand jury testimony were turned over they contained out of context remarks relating to testimony not introduced at the trial. The pages of testimony relating to the discarded motives and other non-testimonial matters constituted the missing

pages which did not get to the Iowa Supreme Court for the first appeal.

In the first appeal to the Iowa Supreme Court the court at pages 712 and 713 of the opinion is critical of the prosecutor for attempting to "improperly influence or sway the deliberations" of the grand jury by his statements and for introducing "a mass of evidence which had no proper place in the grand jury's investigation." The grand jury was thus viewed as being somewhat controlled by the prosecutor.

The Iowa Supreme Court at the time of the second appeal, *State v. Hall,* 249 N. W. 2d 843 (Iowa 1977) had the missing pages and concluded at page 849 that it was a "loosely-controlled and meandering grand jury investigation." Also at the remand hearings it was revealed that the grand jury was "very uninhibited" and decided what they wanted investigated and did "investigating on their own." (Respondent's Appendix, pp. 21-23 from transcript of remand hearings pp. 82 and 84). Clearly, this is within the grand jury's authority. *United States v. Calandra,* 414 U. S. 338, 344-345, 349 (1974); *State v. Hall,* 235 N. W. 2d 702, 712 (Iowa 1975). Federal cases, which were not brought to the Iowa Supreme Court's attention, extend such authority to the prosecutor. *Robert Hawthorne, Inc. v. Director of Internal Revenue,* 406 F. Supp. 1098, 1119 (E. D. Pa. 1976); *United States v. Kleen Laundry & Cleaners, Inc.,* 381 F. Supp. 519, 521-522 (E. D. N. Y. 1974).

Most importantly the remand proceedings bring out what appeared to be unsupported statements by the prosecutor to sway the grand jury as being summation of testimony and other evidence heard by the grand jury (Peti-

tioner's Appendix B, pp. 203a-206a). In any event Petitioner has failed to show how alleged prosecutorial misconduct has prejudiced him. The petit jury did not know of the matters complained of before the grand jury and their verdict of guilty was untainted. *United States v. Calandra*, 414 U. S. 338 (1974); *Silverthorne v. United States*, 400 F. 2d 627, 634 (9th Cir. 1968), rehearing 430 F. 2d 675, cert. denied, 400 U. S. 1072.

II.

Examination of Smudged Fingerprint.

The claim that the Petitioner did not get to examine the smudged fingerprint on the matchbook cover is a misrepresentation of fact. The remand proceedings shows that Petitioner's attorney went to the Iowa B. C. I. laboratory and examined all the physical evidence (Respondent's Appendix, pp. 21-23 from the remand hearings pp. 82-84).

Denial of discovery rule rights must result in a showing of prejudice to Petitioner. *Mullins v. U. S.*, 484 F. 2d 581, 589 (8th Cir. 1973).

No violation of a federal right is specified on this question by the Petition for Writ of Certiorari.

III.

Refusal to Direct Verdict.

Petitioner complains that the lower court should have directed a verdict of acquittal. However, at this time the findings of the jury should not be disturbed. *7th Amendment to the United States Constitution; United States v.*

Frazier, 545 F. 2d 71, 74 (8th Cir. 1976); *State v. Harvey*, 242 N. W. 2d 330, 341 (Iowa 1976). The Iowa Supreme Court's decision upholding the jury verdict should not be reviewed unless wholly unsubstantiated which in this case it is not. *Lamb Enterprises, Inc. v. Kiroff*, 399 F. Supp. 409, 415 (1975).

Again, no violation of a constitutional right is specified by Petitioner pertaining to this issue.

IV.

Rebuttal Testimony.

Petitioner claims the rebuttal testimony of John Reding should not have been admitted. The Iowa Supreme Court (which did not have the opportunity as the jury did to see Mr. Reding and the artist's sketch of the man in the elevator) concluded it must be two different instances involved.

In any event, Petitioner does not allege how or in what manner he was prejudiced by this testimony. Prejudice cannot be presumed; it must be shown. *State v. Franklin*, 242 Iowa 726, 46 N. W. 2d 710 (1951). The testimony of Reding did not incriminate Petitioner according to the findings of the Iowa Supreme Court.

Petitioner claims the testimony of Rosemary Jones should not have been admitted when she was recalled for further cross-examination. She had admitted she lied when she testified previously.

Recall of a witness is within the court's discretion. *State v. Droste*, 232 N. W. 2d 483 (Iowa 1975).

It would have been an abuse of discretion not to allow Rosemary Jones to be recalled to testify on further cross-examination under such circumstances. *Hollins v. State,* 210 S. E. 2d 354 (Ga. 1974).

Recalling Rosemary Jones for cross-examination was the proper way for her to come back as a witness. *Spiro v. State,* 41 Wis. 2d 390, 164 N. W. 2d 230, 233 (1969).

No violation of a federal right is specified in the Petition for Writ of Certiorari as being violated regarding the testimony of Reding and Jones.

V.

Alleged Prosecutorial Misconduct—Final Argument

Petitioner claims his Fifth Amendment constitutional rights were violated by the prosecutor commenting in response to the argument of Petitioner's attorney as to the reason Petitioner did not testify at the trial.

In substance the Petitioner's attorney argued to the jury that Petitioner did not testify as the State's proof presented at the trial was not of sufficient probative value to be worth a response and the prosecutor responded by telling the jurors they were not bound to believe this explanation and could believe as they liked. Petitioner's attorney did not object to this response at the trial.

Under the doctrine of invited error the prosecutor could have responded with his own reasons why he believed the defendant did not testify, but in the words of the Iowa Supreme Court he made a singular reference in a "restrained and temperate manner" to Petitioner's improper arguments.

The doctrine of invited error has been invoked on many occasions. *United States v. Fulton,* 549 F. 2d 1325, 1328 (9th Cir. 1977); *United States v. Warren,* 550 F. 2d 219, 227 (5th Cir. 1977); *State v. Brewer,* 247 N. W. 2d 205, 215 (Iowa 1976).

Also, some violations of the Constitution are so insignificant or unimportant in relation to the circumstances of a case as to be "harmless and therefore not requiring automatic reversal." *Chapman v. California,* 386 U. S. 18, rehearing denied 386 U. S. 987 (1967).

VI.

Alleged Misconduct of Certain Jurors.

Petitioner complains about certain jurors, but does not specify what federal right has been violated in respect to his complaints.

Juror Goodlove was accused during voir dire of the jury of saying, "I don't know why they just don't hang him and get it over with." There is no capital punishment in Iowa and if a juror is jesting during voir dire he is usually thinking about hanging the lawyers. In any event the judge did not believe the person who said he said it and he believed Goodlove when he said he did not recall making such a remark an that he would not have made a comment of this kind (Petitioner's Appendix, page 244a). The issue then turned upon the credibility of witnesses and it is for the finder of fact, not an appellate court, to determine the credibility of witnesses. *State v. Jellema,* 206 N. W. 2d 679, 681 (Iowa 1973).

Juror Housel became aware that he had knowledge that might influence him against the defendant and asked to see the judge. He was excused and an alternate juror replaced him.

The complaint of Petitioner is that the deliberations of the jury were affected by the withdrawal of juror Housel.

Housel denied ever discussing the matter with other jurors. There is no presumption of prejudice; it must be shown. *State v. Franklin,* 242 Iowa 726, 737, 46 N. W. 2d 710, 716 (1951).

Petitioner complains that some jurors had a single highball before a meal during jury deliberations.

To justify a new trial for jury misconduct it must appear that the misconduct was calculated to and probably did influence the verdict. *State v. Houston,* 209 N. W. 2d 42, 45 (Iowa 1973).

When jurors have consumed alcohol, the modern rule is that it will not vitiate the verdict unless it influences proper performance of duties. It is a question of fact for the trial court's determination. *State v. Phillips,* 212 Iowa 1332, 236 N. W. 104, 106 (1931); *Kealoha v. Tanaka,* 45 Hawaii 457, 370 P. 2d 468 (1962).

Petitioner's final complaint regarding the jury is based upon an affidavit by a person named Hinman given more than a year after the conclusion of the trial. The affidavit is not a part of the record of this case, being neither testimony nor a professional statement, and should not be considered.

VII.

Cumulative Effect.

Petitioner alleges that the cumulative effect of the six previously discussed issues mandate a reversal of the case.

Although the cumulative effect concept is applicable in some situations, it cannot be recognized in the case now before this Court. The reason is that Petitioner's assignments of error are without merit and therefore it necessarily follows that the cumulative effect argument is similarly without merit. *Wade v. State,* Okl. Cr., 556 P. 2d 275, 280 (1976). There must be the presence of error to apply the cumulative effect doctrine.

Courts recognize that the doctrine of cumulative error "is to be sparingly and strictly applied." *State v. Hamilton,* 89 N. M. 746, 557 P. 2d 1095, 1100 (1976). In *State v. Carey,* 165 N. W. 2d 27 (Iowa 1969), cited in Petitioner's Writ of Certiorari (page 27), the Supreme Court of Iowa stated that this doctrine "is not to be invoked lightly. It should be resorted to only when, . . ., defendant would otherwise be denied a fair trial." At p. 36. And, as pointed out in *State v. Haffa,* 246 Iowa 1275, 1283, 71 N. W. 2d 35, 40 (1955), cert. denied 350 U. S. 914, 76 S. Ct. 198, 100 L. Ed. 801, a fair trial does not necessarily mean an absolutely perfect trial.

CONCLUSION

The Petitioner has presented no showing on any of the foregoing questions dealing with the merits that indicates he had anything but a fair trial.

In addition he fails to show jurisdiction to grant his Petition for Writ of Certiorari by showing on any issue that a federal question was specifically raised in the trial court and preserved in the Iowa Supreme Court; that it might have been so raised and preserved is not sufficient. *Tacon v. Arizona,* 410 U. S. 351, 352 (1973); *Cardinale v. Louisiana,* 394 U. S. 437, 438 (1969).

Petitioner seeks to review evidence and discuss specific facts and certiorari is not granted for such purposes. *Garner v. Louisiana,* 368 U. S. 157, 166 (1961); *United States v. Johnston,* 268 U. S. 220, 227 (1925).

For the foregoing reasons the Petition for Writ of Certiorari filed by this Petitioner should be denied.

Respectfully submitted

RICHARD C. TURNER
Attorney General of Iowa

GARRY D. WOODWARD
Iowa Assistant Attorney General

Attorneys for Respondent.

APPENDIX

In The District Court of Iowa in and For Johnson County

No. 6115

PROCEEDINGS PURSUANT TO REMAND

STATE OF IOWA,

vs.

JAMES WENDELL HALL,
Defendant

Johnson County Courthouse
Iowa City, Iowa
January 9, 1976

Before:

Hon. Louis W. Schultz, Judge

Appearances:

Johnson County Attorney
Jack Dooley, Iowa City,
Iowa; Assistant Attorneys
General Garry Woodward
and William Enke,

for the State.

William M. Tucker, Esq.,
and Bruce Walker, Esq.,
Bremer Building, Iowa City,
Iowa,

for the defendant.

TRANSCRIPT OF SHORTHAND NOTES

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* * *

Mr. Walker: There is no reflection concerning this time variance we have now discovered. I recall talking with her in excess of a half hour. I can't recall specifically whether Mr. Tucker was present or not, but I do recall meeting with her on at least one occasion or more and spoke with her on the telephone one or two times. I'm afraid I—I do have notes and could review them, but I can't be any more specific.

Mr. Tucker: The time records will show every witness we spoke to. Our time records will show what day he spoke with her.

The Court: Why didn't the State call Elizabeth Allen?

Mr. Woodward: First of all I would like to call to the Court's attention that it seems everyone takes it for granted that this transcript of the grand jury was everything that occurred before the grand jury, and I would point out first of all that the girl who was transcribing for the grand jury, I think it was probably the first time she had worked with a grand jury. Quite frankly, I have had many grand juries but I think up to that time I had never used a court reporter, I had generally used a regular stenographer and dictated to the stenographer. Sometimes we got off the record for a long while because we didn't think about it; other times we cut things off the record because it descended into opinions and sometimes just clarifying things with witnesses, and then we didn't get back on the record. So to say this is a complete record, it isn't. I want to make that clear. There has already been the argument that John Jutte wasn't sworn in. Well, he was sworn in, although it may not show it in the record, the first time he appeared before the grand jury, and he was re-

minded every time he appeared. Now as to Elizabeth Allen specifically, she appeared before the grand jury and she was asked about the—what happened when this telephone call came in. I am not even sure she was present in the room as to the first phone call. She was there in the afternoon and went away and came back. They refer to two phone calls, so I don't think she was present when the first phone call came in, but she said at the time the phone call came in Mr. Roberson went around the room looking for a key to the front door, and there was quite a delay in him hunting for the key, and then it suddenly occurred to me that what do you need a key for, doesn't it have a push bar down there, and she said, "Oh, yes, it does." Then she said, "I guess he was giving me some instructions on typing." So finally I dictated the minutes after her testimony showing a delay taking place of her saying there was a delay of typing before Roberson left the room, and I have a copy of the testimony before the grand jury, and in the dictated minutes it shows "that she remembers one phone call that Roberson received and he directed her how to type a page, then left immediately, being out of the room approximately 15, 20 minutes." That is what she signed at that time. The minutes show that there was a delay, showing that there was—that he was instructing her regarding typing. I considered her a dingaling because her first reason she gave was the fact that he was looking for a key to get in the front door. On that basis we never used her as a witness. We felt that Mr. Roberson, who stood up to our questioning on and off the record, very careful questioning, that he remembered accurately, and we used him as a witness. These minutes of testimony were available from the very beginning to defense counsel and in no way can be considered exculpatory.

• • •

A. No.

Q. And the final name listed is Rory Kuhn. Does that name mean anything to you?

A. No.

Q. Were all of the names brought up by the grand jury in this proceedings relevant to this case?

Mr. Tucker: That is objected to as self-serving.

The Court: Overruled. You may answer.

Mr. Goetz: Would you repeat the question again?

(The reporter read the question.)

A. No, they weren't. I mean this case was surrounded by a tremendous amount of rumor and hearsay and gossip in the community. It was evidenced in the newspapers and statements made by the various participants in the proceedings to the press and public, and to their friends, and of course this type of information was available to the grand jury, since they are members of the community, and they might ask us, "Have you heard about this, or have you investigated this?" and this sort of thing, and this is how these names might have come up.

Q. Did they also sometimes come up in other connections quite aside from the case?

A. Well, they may have, the grand juror may have a child and that child know somebody acquainted with somebody, something like that, and a name might come up that way.

Q. Was one of the members of the grand jury connected with a real estate or insurance business?

A. There was a man in the insurance business there, if I remember correctly. I can't recall his name on the tip of my tongue.

Mr. Tucker: Ziskosky.

Mr. Goetz: Ziskosky, that's right.

Q. Was there a man by the name of Mr. Grady?

A. Yes. He knew a lot about all the rumors in the case.

Q. Do you know whether or not they sometimes just asked questions, "Well, do you know so-and-so?" just on a curiosity basis having nothing to do with the case?

A. Sure. This was a very uninhibited grand jury, we weren't leading them through this investigation whatever, they were doing a lot of investigating on their own.

Q. Mr. Goetz, did you have occasion to go to the City of Des Moines in connection with this case prior to the trial thereof?

A. Yes, I did.

Q. And where did you go?

A. We went to the BCI laboratory.

Q. Who was present at that time?

A. I met Mr. Tucker there. Mr. Tucker, if I remember correctly, came to Des Moines.

Q. And what did you do there?

A. I was present when Mr. Tucker examined the body of evidence that was in the possession of the BCI.

Q. Did the BCI give full cooperation at that time?

A. Yes, I guess they did.

Q. Do you know of anything that was withheld from the defense attorneys at that time that was in the body of evidence?

A. No.